

AUG 14 2003

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURTUNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIARONALD L. LANTHRON, Pro Se
3242 Greenbrook Court
Columbus, Ohio 43224-6802
(614)337-9095

Plaintiff,

v.

HON. ROBERT B. PIRIE, JR.,
Acting Secretary of the Navy, et al.
1000 Navy Pentagon
Washington, D.C. 20350-1000

Defendants.

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF
CIVIL ACTION NO. _____

CASE NUMBER 1:03CV01736

JUDGE: Royce C. Lamberth

DECK TYPE: FOIA/Privacy Act

DATE STAMP: 08/14/2003

Preliminary Statement

Plaintiff respectfully seeks declaratory and injunctive relief from a less than fully honorable discharge issued by defendant and his subordinates based on a special court-martial (Military Judge alone) conviction and sentence held at Camp Le June, North Carolina on September 21, 1971. Plaintiff challenges his character of discharge on the grounds that it violates Articles 1, section 8, clause 14; 2(1) of the Constitution, and the Uniform Code of Military Justice (UCMJ) 801-940, 10 U.S.C. §§ 801-940; and the Navy-Marine Corps Rules and Regulations regarding statutory prohibited enlistments, and court-martials under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 et seq., regarding the various erroneous decisions given by the Navy Department Board for Correction of Naval Records, Navy Discharge Review Board et al., that all were contrary to law, and substantial evidence. 10 U.S.C. §§ 1552, 1553. See 32 C.F.R. § 723.1 et seq (1988). At the time of plaintiff's discharge the regulations authorized five categories of discharge: honorable, general, undesirable, bad conduct, and dishonorable. 32 C.F.R. § 730.51 (1969). The Uniform Code of Military Justice, 10 U.S.C. § 801 et seq., and the Manual for Courts-Martial, United States, 1969 ("MCM"). The

dishonorable and bad conduct discharge are expressly punitive, and carry with them a federal conviction, stigma, injury to person, and many losses including employment opportunities, as well loss of entitlement to federal and state veteran benefits.

Plaintiff respectfully seeks an order requiring Defendant and his subordinates to recharacterize his discharge to Honorable, and to declare that the unconstitutional proceedings leading to plaintiff's enlistment and conviction be declared null and void ab initio; and that the defendants to be directed, to take all necessary and all appropriate measures to cause the conviction to be expunged from plaintiff's record. (Carter v. Jury Commission, 396 U.S. 320, 340, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970)); (Dillard v. Brown, 652 F.2d 316 (3d Cir. 1981), and to restore him to all rights and privileges of which he was deprived, as a direct result of that invalid enlistment, special court-martial conviction and sentence lacking lawful statutory personal jurisdiction in violation of the Constitution, and Congresses intents in the guarding unsuspecting citizens of such. These flagrant encroachments upon plaintiff, are clearly being subverted according to law, because he directly suffers from the inherent prejudicial disability to his life and liberty that, Congress and the Senate rectified in protecting citizens thence. And this in itself obviously is causing the sufferings to plaintiff's fundamental constitutional protected rights, under the Fifth and Sixth Amendments to the Constitution of the United States. Consequently, his rights are continually being abrogated beyond constitutional magnitude and dimension! See Swan v. Clinton, 321 U.S. App. D.C. 359; 100 F.3d 973, 981 n.4 (D.C. Cir. 1996).

In the event that the aforementioned Articles does not render invalid defendant issuance of a less than honorable discharge, plaintiff, in the alternative challenges the validity of his less than honorable discharge, on the ground that his substantial due process rights were violated under the Fifth and Sixth Amendments to the Constitution, and clearly without observance of the procedures required by Navy-Marine Corps

regulations, to a fundamentally fair court-martial trial.

In support of plaintiff's prayer for relief, he respectfully moves the Court in the interest and good order of justice to invoke the values of our constitutional heritage, which accord greater weight to an individual's liberty than to the state's interest in repeated or continuing punishments, and duteously submits to the Court under its narrow exception, his rare case for the Court's inherent remedial powers to right a most terrible wrong: "where youth lacks sound judgment" "for there is no substitute for it if the interest of justice is to be served, especially where his liberty is wrought by the outstanding conviction record that violates the Constitution."

Jurisdiction

1. Plaintiff's cause of action arises under and Article 2(1), and 84 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 802(1) and 884; and 10 U.S.C. §§ 502 et seq. 1970, including his Fifth and Sixth Amendments rights under the United States Constitution; or in the alternative under the Administrative Procedure Act, 5 U.S.C. §§§ 702, 704, 706. In *Parisi v. Davidson*, 405 U.S. 34, 92 S. Ct. 815, 31 L. Ed. 2d 17 (1972), Mr. Justice Douglas in his concurring opinion stated that, the whole military "is simply another administrative agency, insofar as judicial review is concerned." *Id.* At 51, 92 S. Ct. at 825; *United States v. Robel*, 395 U.S. 258, 265, 88 S. Ct. 419, 424, 19 L. Ed. 2d 508 (1967); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967). In plaintiff's case, it is unmistakably clear that his interests were not adequately considered by the intra military remedies.

Jurisdiction of this Court is provided by 28 U.S.C. §§ 1331, and 1651. Declaratory relief is sought pursuant to 28 U.S.C. §§ 2201, 2202. *Jackson v. Wilson*, 147 F. Supp. 296 (D.C. 1957), cf. *Kristensen v. Mc Grath*, 340 U.S. 162, 168-171, 71 S. Ct. 224, 95 L. Ed. 173 (1950); D. C. Code § 11-521 (Supp. V. 1966); *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94, 118 S. Ct. 1003, 140 L. Ed. 210 (1998); *Ex Parte McCordle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1868).

The subject matter jurisdiction defines the Court's authority to hear a given type of case, and Congress did not intend to affect the jurisdiction of the courts. *Ogden v. Zuckert*, 111 U.S. App. D.C. 398; 298 F.2d 312, 315 (D.C. Cir. 1966); *Finn v. United States*, 123 U.S. 227, 8 S. Ct. 82, 31 L. ed. 128 (1887); *United States v. Morton*, 467 U.S. 822, 828, 104 S. Ct. 2769, 2773, 81 L. Ed. 2d (1980); and Congress bestows that authority on lower Courts by statute.

There is an ongoing actual controversy between the parties in which a declaration of rights is sought and needed. Venue is properly in this Court by virtue of 28 U.S.C. § 1391 (e); and plaintiff is left with no other available remedies in vindicating his rights to be a freeman.

It is well settled that federal civilian courts have jurisdiction to review by writ of habeas corpus the validity of a court-martial conviction. *Burns v. Wilson*, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953); *Gusik v. Schilder*, 340 U.S. 128, 71 S. Ct. 149, 95 L. Ed. 146 (1950). There should be no contention that this Court lacks jurisdiction to adjudicate plaintiff's case sub judice, even though that he is not in custody at the time of his action! Make no mistake about it, plaintiff suffers from the ongoing "continuing injuries" from the direct actions from a court-martial lacking in jurisdiction, and will continue to do so till the merits are reached. *Baxtor v. Claytor, JR., Secretary of the Navy*, 209 U.S. App. D.C. 188; 652 F.2d 181 (1981). Nonetheless, the "injuries are real," and are compounded by the "unmistakable social stigma" from his less-than-honorable discharge, that clearly rise to constitutional dimensions. *Kaufman v. United States*, 394 U.S. 217, 229, 89 S. Ct. 1068, 22 L. Ed. 227 (1969); *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976); *Francis v. Henderson*, 425 U.S. 536, 96 S. Ct. 1708, 48 L. Ed. 2d 149 (1976); *Bland v. Connally*, 110 U.S. App. D.C. 375, 381; 293 F.2d 852, 858, n.10 (D.C. Cir. 1962). Furthermore, his less-than-honorable discharge resulted from the conviction here in issue.

It is settled in this Circuit, and the Supreme Court of the United States, that even absent a habeas corpus petition, court-martial proceedings are subject to review by way of declaratory judgment or other form of civil action provided the scope of review is confined that comparable to habeas corpus scrutiny. *Kauffman v. Secretary of Air Force*, 135 U.S. App. D.C. 1; 415 F.2d 991 (1969); *Homcy v. Resor*, 147 U.S. App. D.C. 277; 455 F.2d 1345 (1971); *Owings v. Secretary of Air Force*, 145 U.S. App. D.C. 76; 447 F.2d 1245, 1261 (1971); *Gallagher v. Quinn*, 124 U.S. App. D.C. 172; 363 F.2d 301 (1966). Accord, *Ash v. McNamara*, 355 F.2d 277 (1st Cir. 1965); and in light of the Supreme Court's decisions regarding the necessity that systems of criminal justice provide post-conviction remedies. See *Case v. Nebraska*, 381 U.S. 336, 337, 85 S. Ct. 1486, 14 L. Ed. 2d 422 (1965) (Clark, J., concurring).

Standard of Review In Court-Martial Cases

2. Kauffman held that the standard of review to be applied was that "military rulings on constitutional issues conform to Supreme Court standards, unless it is shown that conditions peculiar to military life require a different rule." As to the scope of that difference, compare *Noyd v. Bond*, 395 U.S. 683, 694, 89 S. Ct. 1876, 23 L. Ed. 2d 631 (1969) with *O'Callahan v. Parker*, 395 U.S. 258, 266, 89 S.Ct. 1683, 23 L. Ed. 2d 291 (1969). See also *Solorio v. United States*, 483 U.S. 435, 439, 97 L. Ed. 2d 364, 371, 107 S. Ct. 2924 (1987), *quoting* *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-241, 4 L. Ed. 2d 268, 80 S. Ct. 297 (1960); *United States v. Augenblick*, 395 U.S. 348, 89 S. Ct. 528, 21 L. Ed. 2d 537 (1968); *Civilian Court Review of Court Martial Adjudications*, 69 Colum. L. Rev. 1259, 1274-1275 (1969); 73 Mich. L. Rev. 886 (1975).

It is in this light that plaintiff's military conviction be examined for conformity to prevailing constitutional standards, because court-martial convictions impose "continuing punishments," besides imprisonment, for which executive relief is available on a continuing basis. See generally, *Schlesinger v. Councilman*, 428 U.S. 738, 746-753, 43 L. Ed. 2d 591,

606, 95 S. Ct. 1300 (1975); *Stone v. Powell*, 428 U.S. 465, 475-476 & n.9 (1976); *Gosha v. Mayden*, 413 U.S. 665, 670 n.3, 37 L. Ed. 873, 93 S. Ct. 2926 (1973); 7 Moore's Federal Practice P.60.25[4], at 215 (1975). See also *Wickman v. Hall*, 706 F.2d 713, 717 (5th Cir. 1983), at 718 calls upon a federal district court to decide the merits of a claim in order to "determine whether federal jurisdiction exists." *United States v. United Mine Workers of America*, 330 U.S. 258, 292 n. 57, 91 L. Ed. 884, 67 S. Ct. 677 (1947).

It is well-settled that a government agency must abide by its own rules and regulations, and where the underlying purpose of such regulations is the protection of personal liberties or interests. *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532, 90 S. Ct. 1288, 25 L. Ed. 2d 547 (1970); *Accardi v. Shaughnessy*, 347 U.S. 260, 98 L. Ed. 681, 74 S. Ct. 499 (1954); *Lebrun v. England*, 212 F. Supp. 2d 5 (2002).

Federal courts-martial are tribunals created by acts of Congress, with the authority to determine finally any case over which they have jurisdiction, and their proceedings are open to review by the civil courts only for the purpose of ascertaining whether the court-martial had jurisdiction, and if it had, whether it exceeded its powers. *Dynes v. Hoover*, (20 How.) 65, 15 L. Ed. 838 (1857); *Ex Parte Nielson*, 131 U.S. 176, 9 S. Ct. 672, 33 L. Ed. 118 (1889); *Grafton v. United States*, 206 U.S. 333, 347, 27 S. Ct. 749, 51 L. Ed. 1084, (1907); *Johnson v. Zerbst*, 384 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938); *Waley v. Johnston*, 316 U.S. 101, 104-105, 62 S. Ct. 964, 86 L. Ed. 1302 (1942); and in *Daniels v. Williams*, 477 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986), "the Court pointed out that the guarantee of due process has historically been applied to deliberate decisions of government officials, and noted that the clause was intended to secure the individual from the arbitrary exercise of the powers of government." *Id.* At 331, 106 S.Ct. at 665.

Parties

3. Plaintiff in this action, Ronald L. Lanthron, is a pro se litigant, who was an unlawfully enlisted alleged former private first class of the United States Marine Corps. He is a citizen

of the United States of America, and currently resides at 3242 Greenbrook Court, Columbus, Ohio 43224-6802.

4. Defendant Secretary of the Navy is sued here in his official capacity. His official place of business is located at 1000 Navy Pentagon, Washington, D.C. 20350-1000. Defendant is responsible for and has the authority to conduct all affairs of the Department of the Navy, including the governance of the separation of all military personnel from the United States Navy and Marine Corps. 32 C.F.R. 701.117. See also United States Army discharge separations, 10 U.S.C. § 3012 (1962). He is empowered to act through a board of civilians to change any military record of a member or former member of the Navy and Marines Corps whenever necessary to correct an error or to remove an injustice. 10 U.S.C. § 1552(a). See 32 C.F.R. § 723.1 et seq (1988).

Pursuant to 10 U.S.C. § 1553, by way of Congress he has established a Discharge Review Board to reconsider the character of a servicemember's discharge from the Navy and Marine Corps, subject to further review by him, after all available remedies have been exhausted, 32 C.F.R. § 581.3(c)(3) (1994).

Basis For Suit

5. Plaintiff bases his suit on the purely legal question of whether the special court-martial had lawful personal jurisdiction to try, convict and sentence him. *Runkle v. United States*, 122 U.S. 543, 556, 7 S. Ct. 1141, 30 L. Ed. 1167 (1887); *Earle v. McVeigh*, 91 U.S. (10 Otto) 503, 507, 91 U.S. 503, 23 L. Ed. 396 (1875); and whether his enlistment was statutorily prohibited; and did the Navy-Marine Corps fail to follow its own Rules and Regulations regarding fundamentally fair court-martials; and whether or not he suffers under the so-called "continuing injury" doctrine. See, e.g., *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69, 84, 478 F.2d 979, 994 (1973); *Cooper v. United States*, 442 F.2d 908, 911 (7th 1971); *United States v. Wheeler*, 17 U.S.C.M.A. 274; 38 C.M.R. 72 (1967); *Pales De Mendez v. Aponte*, 294 F. Supp. 311 (D. Puerto Rico 1969)

(injunctive relief); *Bennett v. Spear*, 520 U.S. 154, 162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997); *Baxtor v. Claytor, JR., Secretary of the Navy*, 209 U.S. App. D.C. 188; 652 F.2d 181 (1981). See also *The Development of Independent Jurisdictional Significance for Civil Disabilities: The Post-Custody Petition*, 1969 Wash. U.L.Q. 436; *Habeas Corpus, Custody and Declaratory Judgments*, 53 VA. L. Rev. (1967). See *Carafas v. LaVallee*, 391 U.S. 234, 88 S. Ct. 1556, 20 L. Ed. 2d 554 (1968) for a discussion of the "collateral consequences" of criminal convictions.

Plaintiff also challenges the fact as to whether the Secretary of the Navy, and the various Boards of Review and Corrections decisions were "arbitrary, capricious, an abuse of discretions, or otherwise not in accordance with the law," or not supported by substantial evidence in the record. 5 U.S.C. § 706. The Court is to set aside the BCNR and AFCBMR actions where it finds that they acted as such. *Chappell v. Wallace*, 462 U.S. 296, 303, 103 S. Ct. 2363, 76 L. Ed. 2d 586 (1982). See *Frizelle v. Slater*, 111 F.3d 172, 176 (D.C. Cir. 1997); *Kreis v. Secretary of the Air Force*, 866 F.2d 1508, 1511 (D.C. Cir. 1989); *Miller v. Lehman*, 801 F.2d 492, 497 (D.C. Cir. 1986) (Secretary is final decision maker for purposes of APA review); and (APA claim is justiciable because "adjudication of these claims requires the Court to determine only whether the Secretary's decision making process was deficient, not whether his decision was correct"). *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374, 60 S. Ct. 317, 84 L. Ed. 329 (1940); *Mudd v. White, Secretary of the Army*, 309 F.3d 819 (2002).

Exhaustion And Preface

6. Plaintiff, mainly as a pro se litigant has assiduously for the last 29 years, been on an odyssey, seeking-out relief from his statutorily prohibited enlistment of January 30, 1970, and his September 21, 1971 United States Marine Corps special court martial conviction - sentence, that was awarded by Military Judge alone, that, "unmistakably lacks constitutional jurisdiction" and is clearly contrary to Congress authority. And because of its actions,

"plaintiff has been made to suffer a lifetime from its curse!" He has exhausted in futile all available intra military remedies; a Presidential Pardon; and other actions in the Federal Courts "with no kind of relief to date!" Darr v. Burford, 229 U.S. 200, 218-219, 70 S. Ct. 587, 597-598, 94 L. Ed. 761 (1950); McCarthy v. Madigan, 503 U.S. 140, 112 S. Ct. 1081, 117 L. Ed. 2d 291 (1992). See also plaintiff's attached "Appendix To Exhausted Odyssey In Support For Order." Note, plaintiff is unsure how to properly present his 29 year odyssey, and in advance apologies to the Court for any inconvenience this may cause. He respectfully admits, that he is deficient in the science of law! He started with the most recent date!

This Court made it clear in Stolte v. Laird, 353 F. Supp. 1392 (D.C. 1972), that, "military rulings must conform to Supreme Court standards." Plaintiff avers that he was clearly not afforded those protections! Burns v. Wilson, 346 U.S. 137, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953); Baxtor v. Claytor, JR., Secretary of the Navy, 209 U.S. App. D.C. 188; 652 F.2d 181 (1981).

Plaintiff humbly beseeches the Court for its hand to invoke one of its most fundamental missions in protecting him, from the "continuing injuries" to his person, and his liberty that are being abrogated by the Government. This abridgement to his constitutionally protected rights was brought about by the quasi actions of agents of the government acting under color causing a statutorily prohibited enlistment and federal special court-martial conviction sentence curse, that is facially, and patently lacking personal jurisdiction over him, and the court tribunal in itself!

The collateral "continuing injuries" from the void conviction are irrefutable, and are of constitutional magnitude and dimension from its curses, the discharge designation continues to impose on him a "life-long disability." Homcy v. Resor, 147 U.S. App. D.C. 277, 281; 455 F.2d 1345, 1349 (1971). These impositions on him bear directly upon his life and liberty, in which he is being admonished from the basic fundamental things of life, including

the enjoyment of all his faculties as well. Galatians 5:1. Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992).

Statement of Facts

7. Plaintiff dutifully presents in chronological order, "Supporting Documentation" (hereinafter "SD- ") for Order, that he hopes will ease in the understanding of his articulation entreaties to the Court, in culmination error for just relief, from the "continuing injuries" in constitutional extent to his life, and liberty in light of the record, and to the fundamental fairness, and interests to the good order of justice where his resulting federal conviction clearly violates Due process of law. Cupp v. Naughten, 414 U.S. 141, 147, 94 S. Ct. 396, 400, 38 L. Ed. 368 (1973).

Plaintiff was born a male twin (five-minutes) earlier than his sister on September 11, 1951, in Franklin County, Columbus, Ohio [SD-1]. He began working at an early age, and attained a part-time work permit, that was issued by the Columbus Public Schools on September 13, 1965: Dino's Pizza [SD-2].

In September 1968, he entered into the (10th) grade with very little attendance. This was due mainly from his working. He withdrew, and was issued a full-time work permit in April 1969: [SD-3](2 pages). His late Parents divorced in Franklin County, Columbus, Ohio on July 10, 1969. Note, his estranged twin-sister, and older brother were already emancipated from home. On September 07, 1969, his right Lung collapsed as a result from blisters formed at childbirth. He was discharged from the hospital on September 18, 1969.

Civilian Criminal Law Infractions & Erroneous Involuntary USMC Enlistment

8. On January 26, 1970, he was arrested in Franklin County, Columbus, Ohio by the Columbus Police Department, and was charged with Receiving and Concealing Stolen Property [SD-4](4 Pages). While he was in jail custody, United States Marine Corps Recruiter, Staff Sergeant Paul. J. Carl (now retired Master Gunnery Sergeant) paltered upon him directly from his jail cell, and said, "if plaintiff would enlist into the Marine Corps

for three years, that he could fix it with the Prosecutor to make the criminal charge go away." Faced with shock, and the possibility of prison time, and without the advice of anyone, and the underlying fact that he was worrying about getting to work; for he was responsible for opening-up the business: "he took the deal," and signed the "Enlistment Contract from within his jail cell." Mr. Carl said he would take it to the Prosecutor for his approval. A short-time later, Mr. Carl returned with the papers, and said that the Prosecutor agreed, and that the charge would go away. *United States v. Barrett*, 1 M.J. 74, 75 (C.M.A. 1977); 50 C.M.R. 493, 494 (1975). Mr. Carl told him, that upon his release to report to his office. *Yellin v. United States*, 374 U.S. 109, 10 L. Ed. 2d 778, 83 S. Ct. 1828 (1963); *Vitarelli v. Seaton*, 359 U.S. 535, 3 L. Ed. 2d 1012, 79 S. Ct. 968 (1959); *Service v. Dulles*, 354 U.S. 363, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957); *Norris v. Norman*, 296 F. Supp. 1270 (N.D. Ill. 1969); *Smith v. Resor*, 406 F.2d 141 (2d Cir. 1969).

Upon his release, he was given a Court date to appear on February 03, 1970; and then, he drove directly to work and made arrangements to be gone for few hours [SD-5]. He then reported to Mr. Carl's office located at State & Third Streets, Main Recruiting Offices for Franklin County, Columbus, Ohio [then]. While he was there, he signed and filled out more papers, and took some kind of tests (in which he failed). Given the hour, and that he had to get back to work, Mr. Carl told him to report back to his Office the following morning; plaintiff's normal work hours were from approximately 2:00 P.M. until 3:00 A.M.

As instructed, he reported the following morning to Mr. Carl's office, and was given more tests that he failed, and would eventually pass. He was then given orders to report the following morning to Fort Hayes Armed Forces Induction Center, Franklin County, Columbus, Ohio for a physical, and more tests. Around 2:20 P.M. that day, he finished there, and was told to report to Mr. Carl's office. Mr. Carl then gave him orders to report to Marine Corps Recruiting Station located in Hamilton County, Cincinnati, Ohio the next morning by 7:30 A.M. Plaintiff asked Mr. Carl why he had to go there, and Mr. Carl said "he owed another

recruiter a favor in filling their respective monthly quotas." This in itself should be clear to the Court that something was irregular in said enlistment and induction (by going to another county to be processed into the Marines Corps). Upon his reporting the next morning in Cincinnati, Ohio, he took more tests and failed, and was told to report back the next morning. What he remembers is that, when he reported, he took more tests, and filled-out more paper work; and took an Oath for enlistment, and was given a "Certificate of Acceptance" USMCR(J) [SD-6](3 Pages). Note, the criminal charge was still pending, and he did disclose this fact to the "Recruiters" there, and on paper work. United States v. McNeal, 49 C.M.R. 668 (1974); United States v. Martin, 1 M.J. 75 (C.M.A. 1975). The enlistment of an ineligible enlistee is void ab initio where it is effected through recruiter malfeasance in violation of recruiting regulations. United States v. Hampton, 7 M.J. 284 (C.M.A. 1979); United States v. Wagner, 5 M.J. 461 (C.M.A. 1978); Robinson v. Resor, 469 F.2d 944 (D.C. Cir. 1972). See United States v. Russo, 1 M.J. 134 (C.M.A. 1975) supra; see Article 84, UCMJ, 10 U.S.C. § 884, and under the provisions of the Military Personnel Procurement Manual (MPPM), Marine Corps Order P1100.74, 61C, Paras. 2110 §§§ g.h.I., 2011, 2012: "no person shall be enlisted while in jail facing civilian criminal charges, and no waivers will be permitted." See also Army Regulation, AR 601-210, par. 4-11; UCMJ, article 2(1) 10 U.S.C.A. § 802(1). Footnote 5 of table 2-6 (C. 8, June 24, 1971).

Plaintiff's age at time of the invalid enlistment was 18 years, and four months (without his Mother's free, or willing consent)(10 U.S.C.A § 505, 1970). Also, his Selective Service number was 383; and during that time period, all citizens who had numbers of 100 or less were highly likely to be drafted.

Regarding the alleged criminal charge of "Receiving and Concealing Stolen Property," [he] will briefly explain the events leading to the misfortunate misunderstanding of the criminal charge brought against him.

On January 22, 1970, while at work (acting Manager) for Dino's Pizza, located at 1127

East Livingston Avenue, Columbus, Ohio: one of his pals brought in an Eight-Track Car-Home Stereo Player, and asked if plaintiff would be interested in buying it. The (pal) said he was selling it because he needed money in a hurry to pay a debt; or he was going to get his rear-end kicked! Plaintiff paid his so called (pal) forty Dollars for the unit. Plaintiff placed the unit inside the Pizza Parlor, so he could listen to it while he was working. The next evening, January 23, 1970, he had the unit playing, and coincidentally, one of his part-time workers had noticed it. This gentleman's name was Mr. "Jimmie Hatfield." Mr. Hatfield asked who the unit belonged to, and if he could look at it! Plaintiff replied, and said it was his, and sure you can look at it! A short-time later, Mr. Hatfield asked where plaintiff had bought it. Plaintiff told him that he bought it from one of the guys that he knew from the area. Mr. Hatfield then informed plaintiff that his brother "Rodney Hatfield," had a unit identical to it stolen from his automobile the previous day! Plaintiff did not believe him because, back then, silly jokes were always plentiful. However, Mr. Hatfield asked plaintiff, if he would be willing to go with him and his brother to the place where it was purchased. Unfortunately, plaintiff declined to go with them, and because of him not accommodating Mr. Hatfield's request, they were left with no other choice but to go to the Franklin County, Columbus, Ohio Police Department and file a criminal complaint against him; and subsequently plaintiff was arrested [SD-7](3 Pages).

On the evening of January 26, 1970, plaintiff contacted Mr. Hatfield, and asked him if he would ask his brother Rodney, if he would please consider dismissing the criminal complaint, because plaintiff did not want to go to prison, and he would be more than happy to return the property, and that he was also enlisted into the Marine Corps from his jail cell.

On January 29, 1970, the "Hatfields" agreed to dismiss the criminal charge! On the day of Court, February 03, 1970, the "Hatfields" and plaintiff asked the Court to dismiss the charge because an agreement had been reached for the return of their property, and also, because plaintiff was enlisted into the Marine Corps. The Court agreed, and dismissed the

charge [SD-8].

On March 21, 1970, plaintiff was 'arrested' again by the Franklin County, Columbus, Ohio Police Department, and 'charged with Forgery' [SD-9]. He was Not the "Forger," but he was implicated, because he drove the 'culprit' [SD-10](2 Pages), to Sears Eastland, located in Columbus, Ohio for a fee of twenty-five dollars, in which he never did receive. While he was in jail, he contacted his Mother for help. She in return contacted Mr. Carl, and a few hours later, he was released on his own recognizance: with a Court date for appearance on April 23, 1970.

On the day of Court, April 23, 1970, He and his Mother, and Mr. Carl appeared. While in Court, Mr. Carl had a conversation with the State Prosecuting Attorney prior to standing before the Judge. When it was his turn to come before the Court, his Mother, and Mr. Carl stood with him, and by consent of the State prosecutor, a non-mutual agreement was reached for him to go active Marine Corps duty as soon as possible. The Judge had agreed, and the charge of "Forgery" was nolle prosequed on that agreement [SD-11](2 Pages). Moreover, his Mother never did give her consent freely nor fully for his enlistment; nor had she signed any type of papers pertaining to the "Unlawful enlistment." Note, coincidentally, and ironically the "culprit forger-Mike Bova," also worked with him at the Pizza parlor.

On April 29, 1970, plaintiff left home by way of a Taxi Cab to Mr. Carl's office; and was driven to Marine Corps Recruiting Station, Cincinnati, Ohio; and from there to the Airport bound for 2ND RTBN MCRD, SDIEGO, April 30, 1970; May 04, 1970 [SD-12](3 Pages).

Boot Camp, ITR, Schools Battalion, [Leave] and Duty Station

9. From May 01, 1970, plaintiff completed the above training: that lied ahead through November 21, 1970 [SD-13]; (including a hospital stay) [SD-14]. Upon completion of this training, plaintiff was given a 30 day leave with orders to report to 2ND 8"HOWBTRY, 2ND FAG FT, FMFLANT CLNC, Camp Le June, N.C. 28542 on or before December 21, 1970.

After the 30 day leave was up, plaintiff reported to the assigned duty station; and with

(less than 07 days) in being there, he was summoned home by way of the American Red Cross for "Emergency leave of five-days" due to the death of his Grandmother [SD-15]; she was buried in Kentucky on December 26, 1970. Note, he fully owned a 1966 Pontiac GTO, and was [not insured] but, because of the emergency nature, he used his vehicle to drive his estranged divorced parents to and from the services. Plaintiff's estranged siblings assisted "not," including their own respectful Services attendance. On the late evening of December 26, 1970, we arrived back home at (his Mother's residence) in Columbus, Ohio. Notably, plaintiff's parents were very inebriated! Shortly after arriving, and getting settled in from the ordeal, plaintiff went to visit some friends, for he wanted no part in his parents drinking frenzy. Upon returning several hours later, he found his Mother setting in a chair with a "Blood-soaked Towel" wrapped-around her Leg. He tried to make sense out of the situation; and what he was able to ascertain from his very intoxicated Mother was that, his Dad and her had argued, and she some-how pulled about a "25 Caliber automatic weapon." They struggled with one another, and the weapon discharged striking her in the leg. He telephoned the Columbus, Ohio Police Department, and was asked to drive her to Grant Hospital Emergency Room (which was less than three miles from the house), where the Police would meet us there [SD-16](2 Pages). Note, no criminal complaint was ever filed in this incident.

After reporting back from the "Emergency Leave," plaintiff spoke with what he remembers as a 'Career Sergeant' in his unit, regarding the crises at home, and which was of no help!

The next weekend, plaintiff flew home while on liberty. While home, he had an automobile accident, and totaled his GTO; he had went left of center. His Mother satisfied the almost \$800.00 damage to the other Automobile; and he ended up signing his title over to the towing company, "G.W. Collins Body Shop" to satisfy the towing charges. The Left of Center infraction happened on January 05, 1971 [SD-17].

On January 22, 1971, plaintiff caught a ride from a location in Camp Le June, that was

known as the "Swoop Circle" from one who was driving to Columbus, Ohio for the weekend; and subsequently, that fellow did not live-up to his part in returning to Camp Le June.

Consequently, plaintiff ended up in being [three days late] in returning. He eventually arrived on January 28, 1971. Later, plaintiff was given an Article 15 for being three days AWOL: January 25, 1971 through January 28, 1971 (which later would be used against him, in the subsequent special court-martial). He was awarded a \$50.00 fine for one month, and 15 days in a "Correctional Custody Platoon." In the meantime, plaintiff was restricted to Quarters, Chow Hall, PX, and place to Worship: till transportation could be arranged for him to "CCP."

During the wait time, plaintiff telephoned his Mother, and informed her as to what had happened to him for being three-days late. She in return said she was very sorry, and that his Dad had broken in on her 'again' and "beat" her; plaintiff in return asked her if she wanted him to come home. She said yes, and plaintiff packed some items belonging to him, and broke said restriction, and hitchhiked home. Exodus 20:12.

Breaking Restriction-AWOL and HOME

10. On February 03, 1971, plaintiff broke restriction, and departed for home in Columbus, Ohio, and subsequently was placed on the rolls from the Marine Corps as being a deserter.

During the AWOL duration, he lived with his Mother, and obtained employment with National Geographics Printing Co., in Columbus, Ohio.

On June 07, 1971, he would be arrested by the Columbus, Ohio Police Department, and charged with 'intoxication.' He was able to post bond to get released [later to be forfeited on June 08, 1971]; and on July 08, 1971, while at work, he was civilly [although very embarrassed] apprehended by the FBI, and transported to the custody of the Franklin County, Ohio Workhouse, where he was detained in confinement, to await for the Marine Corps custody taking.

Brig Confinement

11. On July 15, 1971, plaintiff arrived at Cherry Point, North Carolina Air Station where he would be further, taken into custody by the Marine Corps Military Police, and transported to the brig, where he would be held placed immediately in custodial custody.

While in brig confinement, plaintiff was assigned a Captain Steven Denton as Counsel, which informed him that, he was being charged with 'Desertion' under Article 85 of the Uniform Military Code of Justice, and 'Missing a Movement' under Article 87; 10 U.S.C. §§ 885 & 887, in which he could be tried by a general court-martial, and sentenced in the brig for a very long time, and be discharged with a dishonorable discharge. 32 C.F.R. § 70.6(c)(3)(ii)(A)-(D).

Captain Denton suggested that he make application for an 'Administrative' discharge for the good of the service: a 'Undesirable discharge' in lieu of the pending general court martial; and that plaintiff would have up to 15 years to apply for a "discharge upgrade." See *Middleton v. United States*, 170 Ct. Cl. 36 (1965); *Neal v. United States*, 177 Ct. Cl. 937 (1966); *Haines v. United States*, 453 F.2d 233, 237 (3d Cir. 1971).

Plaintiff signed the paper work for such discharge on July 30, 1971, and on September 13, 1971, Captain Denton informed him that the request had been denied, and that plaintiff would definitely be having a courts-martial [SD-18](5 Pages). Moreover, Captain Denton informed plaintiff, that, "if he would agree to plead guilty to a trial before a Military Judge alone, and take a bad-conduct discharge," that it would be under a special court-martial, and the charges would be reduced to: AWOL, and Breaking Restriction, under Articles 86 and 134 of the U.C.M.J, 10 U.S.C. §§ 886, & 934; and that he would have to serve up to six-months in brig confinement, and forfeiture of some pay; and that he could apply within 15 years for a discharge upgrade! Captain Denton never did ask plaintiff why he went AWOL.

On September 17, 1971, plaintiff wrote to the late Honorable Robert Taft, Jr., United States Senator [SD-19](7-Pages). He did so on the advice of one of his fellow brig inmates.

Plaintiff was able to obtain a copy of this letter, by way of his "FOIA" request to the United States Marine Corps. This letter is somewhat self-incriminating to him! However, the first page (Naval Speed Letter) clearly makes reference to January 26, 1970 [his] arrest; and the last page shows his desire then, as being a Pizza maker. The only other information he does not have that bears down on the malfeasance of the government agent, is a letter he had written, while he was in boot-camp: (platoon 2058) to his original Marine Corps Recruiter, "Staff Sergeant Paul J. Carl." What he remembers, is, "drawing his hand print on the letter, and writing very little words!" Plaintiff failed to request a copy of this letter in his "FOIA" made earlier to the United States Marine Corps, because he forgot about it until afterwards!

Given the 'choices' facing plaintiff, [just as in his enlistment]: a *Hobson's choice] he took the Captain's deal. See the case of Mootry v. Grayson, 104 Fed., 613, 616 (1900) where the Court said: "But, as the consent of the parties to the action can not give the court jurisdiction of a case that is otherwise without its jurisdiction."

Moreover, "not at no time," did Captain Denton ever in a scintilla inform plaintiff, [that,] by pleading guilty, it would be for offenses[s] against his own "Country," and that he would be a federal lifelong convicted felon [with unbelievable-ongoing-prejudicial-injuries] to his actual real [person] in returning back into "civilian Life;" nor did Captain Denton ever mention the possibility of "Clemency" through the Naval Clemency Parole Board; nor of the indispensable prerequisite of "Jurisdiction" during the special-court-martial proceedings; nor did he ever question him, as to how he was enlisted into the Marine Corps!

*[After Thomas Hobson (d. 1631) of Cambridge, England, who owned livery stables and let horses in strict order according to their position near the door.] A choice of taking what is offered or nothing at all!

Special Courts-Martial by Military Judge Alone

12. On September 21, 1971, plaintiff was tried by a special court martial by Military Judge alone [SD-20](65 Pages). The trial was convened by the Commanding Officer, and

held at 2D Field Artillery Group, Force Troops, Fleet Marine Force, Atlantic, Camp Le June, North Carolina 28542. Consistent with plaintiff's guilty pleas, that were involuntarily made based solely upon Captain Denton's unconstitutional advice, [in which he wholeheartedly believed] and the clear fact that plaintiff did not possess an understanding of law in relation to the facts, nor to what was happening to him, and his life, the Court should see it for what it was, "improvident," and obtained in violation of due process and therefore be void. United States v. Care, 18 U.S.C.M.A. 535; 40 C.M.R. 247 (1969); citing Johnson v. Zerbst, 305 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). It should be clear to the Court, that plaintiff's waiver was not knowing, intelligent, nor voluntary. See Fairchild v. Lehman, 814 F.2d 1555, 1559 (Fed. Cir. 1987). For his unconstitutional plea, he was found guilty of unauthorized absence and breaking restriction, in violation of the Uniform Code of Military Justice, UCMJ Articles 86 and 134; 10 U.S.C. §§ 884 and 934 [SD-21]. He was sentenced to four months confinement at hard labor, forfeiture of \$65.00 per month for four months, reduction from E-2 to E-1, and a bad-conduct discharge. Also, on September 21, 191, his trial defense counsel, Captain Denton had plaintiff sign a document that said, "waiver of defense counsel [SD-22].

On November 17, 1971, the Staff Judge Advocate illy approved the sentence, and findings of the special court-martial proceedings, clearly because his review was "substantially prejudicial" to plaintiff's rights. See 32 C.F.R. § 70.6(b)(1). [SD-23](2 Pages).

On November 18, 1971, the Officer exercising general court-martial authority approved the sentence as approved by the Convening authority.

On November 24, 1971, plaintiff waived restoration back to duty requesting execution of the discharge adjudged by the special-court-martial without the advice of counsel [SD-24].

On December 17, 1971, the United States Navy-Marine Corps Court of Military Review (now the United States Navy-Marine Corps Court of Criminal Appeals) affirmed the findings

of guilty and the sentence as approved below. N.C.M. No. 71-3341: [SD-20].

On February 04, 1972, the Naval Clemency and Parole Board recommended no Clemency.

On February 08, 1972, the Commanding General, Force Troops, Fleet Marine Force Atlantic, issued a supplemental special court-martial order executing the sentence. Note, plaintiff was an above average (model) prisoner, while he was confined to the brig as part of his sentence.

The Special Court-Martial Proceedings

13. Plaintiff dutifully and positively avers, that, his testimony and statements were all taken unsworn, and were involuntarily made. The enclosed pernicious trial transcript [SD-20] is denude of the indispensable perquisite of personal "jurisdiction over him, and the court-martial itself." It clearly lacks in sine qua non of jurisdiction; and the issue of jurisdiction is not waived by a guilty plea [specially where it was never lawfully had in the first instance]. Uniform Code of Military Justice, Manual for Court Martial (MCM) Par. 67, Subd. A. See also [SD-20]. R.C.M. 910(a); R.C.M. 1001(b)(4); R.C.M. 910(e). *Mooney v. Holohan*, 294 U.S. 103, 113, 55 S.Ct. 340, 342, (1935); 98 A.L.R. 406. Where the error or defect is jurisdictional, however, the normal rule is that such a defect cannot be cured by waiver; also where other legal errors goes to the jurisdiction of the court-martial depriving plaintiff of a full and fundamentally fair trial. This clearly violated his constitutional rights in relation to the doctrine of fundamental fairness. Furthermore, consent of plaintiff to be court-martialed could not confer jurisdiction on court lacking jurisdiction. *McClaghry v. Deming*, 186 U.S. 49, 22 S. Ct. 786, 46 L. Ed. 1049 (1902).

Moreover, plaintiff on the erroneous misgross advice of Captain Denton, (in which plaintiff wholeheartedly believed) waived his right to appellate defense counsel before said Navy Court of Military Review, and the Court of Military Appeals. See *Carter v. United States*, 213 Ct. Cl. 727 (1977) (disloyal and injurious conduct by counsel invalidates discharge below Honorable Discharge); *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2457, 41 L. Ed. 2d 439 (1974). Plaintiff's

waiver to appeal clearly was not "an intentional relinquishment or abandonment of a known right or privilege." His waiver was based solely upon his trial defense counsel's egregious advice. Clearly Captain Denton provided plaintiff with unconstitutional effective assistance of representation-misgross advice. *Bute v. Illinois*, 333

U.S. 640, 68 S. Ct. 763, 92 L. Ed. 584 (1948); *De Meerleer v. People of State of Michigan*, 329 U.S. 663, 67 S. Ct. 596, 91 L. Ed. 584 (1947); *Schneckloth v. Bustamonte*, 412 U.S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973); *Murray v. Carrier*, 477 U.S. 478, 91 L. Ed. 2d 397, 106 S. Ct. 2639 (1986); *Smith v. Murray*, 477 U.S. 527, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). See also *Friendly, Is Innocence Irrelevant?* 38 U. Chi. L. Rev. 142, 151 (1970); *Warren, The Bill of Rights and the Military*, 37 N.Y.U.L. Rev 181 (1962).

Captain Denton also clearly stated to the Court that, he was aware of the charges in plaintiff's case, and he had been detailed defense counsel for plaintiff for some time now; and no possible defense to these alleged charges! In addition, Captain Denton had him sign document that, in essence said I, the plaintiff do not want defense counsel to argue the imposition of the bad conduct discharge. *Gigilo v. United States*, 405 U.S. 150, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). [SD-25](3 Pages).

During these proceeding, the Military Judge ask plaintiff why he joined the Marine Corps? Plaintiff answered by saying that, "he was going to be drafted Sir." He said this out of fear for his life, and the thought of being court-martialed by the general court-martial, and receiving a lot longer prison sentence and a dishonorable discharge! His Selective Service Number was 383. Also, Captain Denton never-ever questioned him, as to how he was originally enlisted [SD-26].

Furthermore, the Military Judge asked if there was a pretrial agreement in connection with the plea in this case? Captain Denton answered, and said "No, Sir, there is not." This was a flat out blatant lie! For there was! As stated previously, plaintiff was facing a general court martial for desertion, and missing a movement. As the record clearly shows Captain Denton

requested the masking of certain matters on the charge sheet: namely, "the original charges for desertion and missing a movement. Then immediately "trial counsel requested a three minute recess to improperly mask (cover-up) these original entries." [SD-27(3 Pages)]. See *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1706, 64 L. Ed. 2d 333 (1980).

Additionally, the Military Judge asked Captain Denton if he felt there is any possible defense to these alleged offenses, and Captain Denton said no Sir, I do not. Plaintiff avers this was extremely prejudicial to his rights to a fundamentally fair trial. It is in this light that plaintiff attests, that, if Captain Denton properly represented him, a defense clearly well could have been made; and the record further would have disclosed the FBI file on plaintiff! This too, was a clear flagrant disregard to plaintiff in having a fundamentally fair trial: where the government has in its possession, files that clearly would have brought the light to court-martial jurisdiction: a sine qua non in all trials where a person life and future are at stake; and by not disclosing such records is a clear violation of plaintiff's substantial due process rights; an egregious act by depriving one of a defense, and his fundamental substantial right to a fair trial! [SD-28](5Pages). "The ordinary rule, based on considerations of fairness, does not place the burden upon litigant of establishing facts peculiarly within the knowledge of his adversary." *United States v. New York, N. H. & H. R. R.*, 355 U.S. 253, 78 S. Ct. 212, 2 L. Ed. 2d 247 (1957). In addition to the consideration that the interest of the United States in a criminal prosecution ". . . is not that it shall win a case, but that justice shall be done, . . ." *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 1314 (1935); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985); *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995); *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

Finally, Captain Denton signed off on the trial record, which again was prejudicial to plaintiffs rights in having a fundamentally fair trial [SD-29]. *Middendorf v. Henry*, 425 U.S.

25, 96 S. Ct. 1281, 47 L. Ed. 2d 556 (1976); Kimmelman v. Morrison, 477 U.S. 365, 381, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); Brecht v. Abrahamson, 507 U.S. 619, 113 S. Ct. 1710, 123 L. Ed. 2d 353 (1993); United States v. Wheeler, 17 U.S.C.M.A. 274; 38 C.M.R. 274 (1967); United States v. Magnan, 52 M.J. 56 (1999); Wiggins v. Smith, United States Supreme Court, No. 02-311, June 26, 2003.

No one should be represented by an attorney who is making him the "fall guy by design." United States v. Allen, 831 F.2d 1487, 1497 (9th Cir. 1987). See R.C.M 109 (a). Defense counsels representation of an accused: where his or hers performance full far below the Regulatory Standards as proscribed by the Code and Manual; and trial counsel failure to disclose any evidence favorable to defense. R.C.M. 701(a)(1)(a)(4).

In plaintiff's case, he was clearly afforded Captain Denton's unconstitutionally effective assistance of counsel notwithstanding the other fact that, the entire courts-martial members were biased to his fundamental and substantial rights to a fair trial! Hence, every review plaintiff has had to date for relief has been in odyssey, and ineffective directly because plaintiff wholeheartedly trusted and believed his counsel was doing right by him.

In light of the consequences directly from the unconstitutional actions imposed on the plaintiff, "[h]e continues to suffer in constitutional dimension from the flagrant constitutional violations brought about by the enlistment and special court-martial unconstitutional actions"!

"The fruits of an initial illegality cannot be used to punish, . . ." Wong Sun v. United States, 371 U.S. 471, 487, 488, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Addendum In Support Of Order For Relief

14. Plaintiff duteously presents to the Court, what is left of his eroded constitutional rights in this matter as being mandatory and compulsory, and not one of grace. It is in this light where his right to claim is well founded, and respectfully moves the Court on every consideration of law and justice, to take the law as it finds it, and not shut its eyes in

vindicating the Constitution, and to exonerate him from the infirm constitutional curse! *Marbury v. Madison*, 1 Cranch 137, 5 U.S. 137, 2 L. Ed. 60 (1803); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 1055 S. Ct. 3249, 87 L. Ed. 2d 313 (1985); *Powell v. McCormack*, 395 U.S. 486, 89 S. Ct. 1944, 23 L. Ed. 2d 491 (1969).

This Court has a bounden duty to see that unlawful enlistments, and courts-martial who impose there powers without lawful jurisdiction, are corrected from within the teeth of Congress, and the respecting of Public Policy to all its citizens. *Ex Parte Nielsen*, 131 U.S. 176 (1889). For clearly when a citizen is convicted in direct contravention to Congress intents, it presents "extraordinary circumstances" where it involves "civilians who contends, that Congress had no constitutional power to subject them to the jurisdiction of courts-martial." *Schlesinger v. Councilman*, 420 U.S. 738, 754, 43 L. Ed. 2d 591, 606, 95 S. Ct 1300 (1975) at 760.

Clearly, what is done contrary to prohibitory law is null and void; it is "in direct contravention of the polices of the government." See in *Re Taylor*, 160 F. Supp. 932 (1958), where although the case is one for habeas relief, the Court held that if there was a clear lack of jurisdiction in the army to court-martial an individual for the offenses in question, then this would present such a "rare case, with exceptional circumstances of peculiar urgency" as would authorize the District Court to entertain jurisdiction and issue a writ on the individual's behalf. It is in this further light that plaintiff is situated; for his court-martial unequivocally lacks jurisdiction, and it exceeded its powers to curse him!

Enlistments In Violation Of A Statute

15. In enlisting in the Armed Forces involves numerous statutory provisions, which determine who may enlist, and thereby enter into a contractual relationship with the Government. Under 10 U.S.C. § 502 (1970), prerequisites to enlistment are prescribed by statute. As a general rule, if an individual is under 17 years of age, insane, intoxicated, a felon, or a deserter, the enlistment will be void. Normally an enlistment presents no

problems and the soldier is deemed amenable to jurisdiction. However, problems may arise when the enlistment is violative of a statute, regulation, and public policy considerations. See generally Schlueter, *The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1 (1977).

A statutory provision which has caused numerous problems in the past is the provision which specifies the required age of enlistee. For an example, the Secretary of the Army may accept original enlistments from males and females who are not less than 17 years of age. However, no male or female under 18 years of age may enlist without the written consent of his or her parent or guardian. A person may not enlist validly in the United States Army if he or she is under 17 years of age. Such an enlistment is void and does not change the minor's civilian status. If an offense proscribed by the UCMJ is committed by the minor before his or her 17th birthday, there is no jurisdiction to try the offender by court-martial. Such a person, under the statute at that time, has no competence to acquire military status, and therefore is not subject to military law. The Secretaries of the Armed Forces has proscribed that, "No person who is insane, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the Secretary concerned by authorized exceptions, in meritorious cases, for the enlistment of deserters and persons convicted of felonies." 10 U.S.C. § 504 (1982); "[N]o person under 18 years of age may be originally enlisted without the written consent of his parent or guardian, if he or she has a parent or guardian entitled to his or her custody control." 10 U.S.C. § 505 (1970; 1982). Age requirements in 1970 required the parent or guardians written consent, if the enlistee was between the ages of 17 and 18 years of age. Another factor closely related to that of age is that of education: the Secretary of the Army may temporarily prohibit the enlistment of persons who lack a high school diploma or G.E.D. "[N]o person shall be accepted for enlistment after he or she has received orders for induction." 50 U.S.C. app. § 465(d) (1970).

In *United States v. Blanton*, 7 U.S.C.M.A. 664; 23 C.M.R. 128 (1957), the accused enlisted in the Army when he was 14 years old. He absented himself without authority before his 16th birthday. Four years later, he was apprehended and convicted by general court-martial of desertion. The Court of Military Appeals held that the accused was never on active duty at an age when he was competent to serve in the Army. His enlistment was void, and the court-martial had no jurisdiction over him or the alleged military offense.

Enlistments: Civilian & Military Status For Courts-Martial Jurisdiction

16. In support of plaintiff's rare case see "Coerced Enlistments," *The American Law Review*, Volume 25:437 (1976). Also in further support, see where the Supreme Court on the same day decided two cases, in which abdicates direct light on the question of "status" from being a civilian to a military one. It is in this light that plaintiff's statutorily enlistment and court-martial conviction-sentence are in direct contravention to the Constitution, and Congresses good intents regarding ineligibles for enlistments into the Armed Forces. Hence, an inherent unbeknownst statutorily disability to his status for regulatory disqualification existed, and the fact of the natural wrong in the manner it was established directly by the 'recruiters' "overt actions" in enlisting him from his jail cell, while criminal charges were running!

In *re Grimley*, 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890), and *In re Morrissey*, 137 U.S. 157, 11 S. Ct. 57, 34 L. Ed. 644 (1890), in which Mr. Justice Brewer delivering the opinion in each. *Grimley* was over age, and deceived the enlisting officer. There was no statute directly prohibiting the enlistment, or under a penalty, and no "inherent vice" in his service. The statute concerning the enlistment was directory rather than prohibitory. The limitation as to age was for the benefit of the government. No one's rights were involved except *Grimley's* and those of the government. He was *sui juris*, and could waive his own rights. His enlistment was irregular only in that he had passed the age limit, and deceived the officer as to that fact. The Supreme Court held he was estopped to take

advantage of his own wrong, and the government, the wronged party, had waived its objections under these circumstances, the court held that Grimley acquired a valid military status, notwithstanding the limitation as to his age. The Court, discussing the statute asks: "Who can take advantage of Grimley's lack of qualification?" and answers: "Obviously, only the party for whose benefit it was inserted." The party there was the government, and it waived the lack of qualification. Concerning the acquisition of a military status, the Court remarked: "Of course, these considerations do not apply where there is idiocy, insanity, infancy, or any other disability which, in its nature, disables a party from changing his status or entering into new relations; but where the party is sui jurist, without any disability to enter into the new relations, the rule generally applies."

In Morrissey's Case, the Court again answers the question: "Who can take advantage of the lack of qualification?" Speaking of a statute forbidding the enlistment of minors in the army without the parent's consent, the Court said: "This provision is for the benefit of the Parent or guardian. It means simply that the government will not disturb the control of the parent or guardian over his or her child without consent. It gives the right to such parent or guardian to invoke the aid of the court, and secure the restoration of the minor to his or her control; but it gives no privilege to the minor." Morrissey enlisted under age, and his mother did not consent. She took no steps whatever to assert her rights, and did not sue out the writ of habeas corpus, which was asked by Morrissey himself after he had been convicted of desertion, and was undergoing punishment. The Court in that connection, remarked: "His mother not interfering, he was bound to remain in the service, and, the parent not insisting on her rights, the fact that he had a mother living at the time is therefore immaterial." It was not decided in that case that any military status would have remained if the parent had interfered, or that the enlistment, whatever its character as to the minor, does not become void ab initio when the parent interferes. The doctrine in that case is declared in view of the fact that the parent had never interfered. All that the case

and the argument in support of it maintains is that the minor, so far as he was concerned, acquired a military status which, as against him, was good until there was interference by one who had a right to his custody and control. There was "inherent vice" in the eye of the law in the service of the minor in this case, as against the father. It was culpable in the eyes of the law, as to him, because it lacked consent. The father's consent to the minor's service is a condition precedent to the enforcement of any naval status against the parent. Without that consent, the minor was of the class forbidden to serve, under the very terms of the law, as emphatically as any other minor who is forbidden to serve, and cannot acquire any military status; for he is debarred, as against the father, from entering into the "new relation." As said in *People v. Warden*, 100 N.Y. 20, 2 N.E. 870 (1885), "This requirement is therefore made the condition of a valid enlistment." The right not to consent is a weapon the law furnishes the parent to destroy the government's claim. It gives the right to take off the uniform, and all its wearing imports. The father here is the wronged party, and the government is the wrongdoer. The father can "take advantage of the lack of qualification." As against him, the government could not waive it, or create any right against him by trying to waive it. The language of the opinion, "the mother not interfering, he was bound to remain in the service," inevitably implies, if the parent had interfered, the minor would not be "bound to remain," if he would not be "bound to remain," leaving the service was not desertion. The interference of the father puts an end to the service, as to the father, and destroys the only status which could authorize the naval authority to detain the body of the minor from the custody of the parent.

Furthermore, where and because the government was the wrongdoer, it can no more take advantage of its own wrong than any other party in a court of justice. No right to the status of a human being [such as is the case of the plaintiff's] can grow out of an illegal agreement, for a status of service, which is contrary to public policy. If this is not by doing indirection what cannot be done directly, it is to present an illustration which would violate

the maxim.

No transaction offensive to public can be ratified, or given effect in any way, by any power other than the author of the law, unless the lawmaking power, the creator of the prohibition and the policy, delegates its own dispensing power over them to some other body or agency; and even then the consequences of the prohibition and policy are not withdrawn or subverted until that body or agency does the things required to be done to take the sting of the prohibition out of the forbidden act.

The statute outlaws his enlistment the very moment it was made. The enlistment remains all the while an outlaw and, [plaintiff] prays for relief from the sentence of condemnation which the law pronounced upon him in advance . . . The law is clear and unambiguous in declaring such enlistments as wholly vicious and ineffective as void ab initio. The law disapproves the enlistment and sentence of condemnation and of the collateral consequences it had already pronounced. It is quite true that ordinarily the criminal courts will take a minor from the custody of the parent to punish him for a crime. In such cases, the relation of parent and child, or the minority of the offender, if he has reached the age at which he is capable of forming a criminal intent, in no way forms an element of the crime, or the jurisdiction of any court to try him for it. The Constitution does not impugn the principal in the least in insisting that here, by reason of infancy and the want of the parent's consent, the minor could not acquire the status against the parent's wishes, which is an indispensable element of the offense of desertion, and the continued existence of which is a condition precedent to the jurisdiction of a naval tribunal to detain and try the minor. The naval status of the minor is none the less destroyed, in contemplation of law, as against the father, because the government, refusing to recognize the destruction of the status, and insisting upon it, regains the custody of the minor, and thus forces the father to appeal to the civil courts to adjudicate and enforce his rights. Such adjudication's do not create the destruction of the enlistment. The law, and if not the law

alone, the father's act combined with it, annihilates the status. The judgment of the court merely recognizes and enforces the existing right. If, in this instance, the judgment could be held to create the right, yet, being in furtherance of justice against the wrongdoer, it must relate back to the beginning of the illegal transaction. Surely the government is the wrongdoer when it insists upon the enlistment in spite of the parent's dissent. The offense of desertion, for which the minor was held in custody by the chief of police, consisted in peaceably leaving the service. True, the minor could not disaffirm the enlistment of his own volition; but he left and came back to the father, who ratified and approved the act of leaving, and made the act effectually his own as if he had ordered the minor to leave. The minor was back where the law said he belonged. The parent had a right to get the custody and control of the minor, at least peaceably, wherever he found him, and the father had the superior right against any claim growing out of the enlistment, made without the father's consent. Blackstone says it may "frequently happen that a man's wife, children, or servants would be concealed and carried out of his reach, if he have no speedier remedy than the ordinary process of law. If, therefore, he can so contrive as to gain possession of his property, without force or terror, the law favors and will justify the proceeding." Here, the mother's recaption of her son was complete and peaceful. It was this peaceful and lawful possession by his father which was disturbed when the son was taken from her custody by the chief of police. *Ex parte Reaves*, 121 F. 848 (1903).

Plaintiff additionally avers and posits that, the special courts-martial tribunal was without jurisdiction to try, sentence and convict him under the Fifth and Sixth Amendments of the Constitution of the United States, *Ex parte Milligan*, 4 Wall. 2, 18 L. Ed. 281 (1866); *Winthrops Military Law and Precedents*, vol. 1 pp. 144, 145; *Freeman on Judgments*, 324; *U.S. v. Chung Shee*, 71 Fed. 277, (1895); *Weir v. Marley*, 99 Mo. 484, 12 S.W. 798, 6 L.R.A. 672 (1889); *People v. Mercein*, 3 Hill. 399, 38 Am. Dec. 644 (1842); *McConologues's* case, 107 Mass. 154, 170 (1871). In the case of *In re Miller*, 114 Fed. 839 (1902), the

Court of Appeals say: "The question to be decided is whether the court-martial has jurisdiction to try the prisoner on the charges preferred against him."

This Court should take the law as it finds it, and regard his claim which the law of God, of nature, of the state, and of the United States clearly forbade the enlistment of ineligible. Congress, by its prohibition, intended to save and afford one a defense . . . [T]he law never permits a construction of legislation which authorizes evasions of its policy. *Magdalen College Case*, *Coke's Reports*, vol. 11, p. 66; *Bank of U.S. v. Owens*, 27 U.S. 527, 7 L. Ed. 508 (1829). Plaintiff's offense is the inevitable consequence of the illegal enlistment, and court-martial conviction for purely military offenses.

Congress made its intents clear pertaining to ineligible for military service. It is just what it means, ineligible; the government is without authority to acquire lawful status for military service of an ineligible. and so far as it has any effect in determining the status of persons receiving pay and allowances, is necessarily confined to cases of enlistment where the recruits are *sui juris*, and fairness prevents the government in circumventing a status that was never lawful in the first instance into a constructive enlistment.

However, when it comes to military recruiters who enlist ineligible in the first instance, where they knowingly know that such enlistments are prohibited, and the evils they had in view to suppress the unlawfulness by sending him out of his home town to another recruiting district in order that they fill their monthly recruiting quotas! To construe the law as giving a military status to an ineligible at any time would annihilate the purposes and intention of Congress intents of prohibiting of such enlistments. In plaintiff's case, the offense of purely military in nature is the inevitable consequence of the illegal enlistment, and special court-martial conviction. Congress, by its prohibition, intended to save to the citizen who is ineligible in the first instance from enlisting; and where the overt acts of the agents for the government impinge unlawfully upon a citizen by illegally offering inducements that are false, such enlistments are void at inception: the status cannot

lawfully be had in the eyes of the Constitution.

Congress' has the power to regulate the Armed Forces, and noted that the power granted Congress in Article 1, section 8, clause 14 to make rules for the government of the land and naval forces appeared in the same sections as the powers to regulate commerce, coin money, and declare war. And there was no indication that the grant of power in clause 14 was any less plenary than the other grants of power to Congress. *Toth v. Quarles*, 350 U.S. 11, 76 S. Ct. 1, 100 L. Ed 8 (1955); *Reid v. Covert*, 354 U.S. 1, 77 S. Ct. 1222, 1 L. Ed 2d 1148 (1957); *Crowell v. Benson*, 285 U.S. 22, 76 L. Ed. 598, 52 S. Ct. 285 (1932); *United States v. Jacoby*, 11 U.S.C.M.A. 428, 29 C.M.R. 244 (1960).

Unlawful Enlistments

17. Unlawful enlistments are an infinite concern to society. Congress legislates . . . and has concluded that recruiters for the government are forbidden and prohibited from enlisting ineligible from jail as an alternative for the dismissal of criminal and felon charges a citizen may be facing. Congress repudiates such enlistments, and of the overt actions of government recruiters who recruits ineligible. See Article II, 10 U.S.C. § 802 hearings: On November 09, 1979 Congress deemed such enlistments pernicious and hostile to the public weal, and peremptorily forbade them. The law having impressed that character upon the transaction, it can have no other character in the courts. "A thing which is in the intention of the makers of the statute is as much in the statue as if it were in the letter." "When the lawmaking power speaks upon a particular subject over which it has constitutional power to legislate public policy in such a case is what the statute enacts." Upon reason and authority, enlistment of ineligible is contrary to fundamental public policy, and absolutely void as a matter of law and the statute discloses a contrary intent that it does not forbid ones service as such, or regard it as vicious or improper itself. The prohibition is imposed solely for the protection of the citizens constitutional guaranteed rights that are inherent and sacred as in alienable rights, and upon discovery may invoke (or raise the issue of

jurisdiction), especially where in plaintiff's case, the special court-martial tribunal failed its duty in the first place.

Jurisdiction is born within: a matter not lightly to be taken, an inherent indispensable non-waivable sacred right, that may be contested and challenge upon a preponderance of the evidence: in which the plaintiff offers as such.

It is in this light that plaintiff respectfully raises a federal question: Whether the special court-martial sentence conviction had lawful jurisdiction in the first instance?

Clearly no, his status from civilian was never lawfully had. It did not change lawfully to a military status! The Plaintiff citizen in this case was non sui juris to the courts-martial in the eye of the statute, and is harmed by violation of that right to be free from its unconstitutional impositions upon his life; and not to be infringed upon by overt actions of the government in the eyes of the Constitution.

A citizen that is ineligible may invoke the violation of the prohibition for it is an absolutely void transaction, and the results otherwise are detrimental to a citizen's [his] constitutional rights from such that become detrimental to a citizen [him] that, the unknowingly guaranteed constitutional rights have been of magnitude infringed thereupon . . . The ineligible cannot volunteer in the eyes of the law against Congress protections. An enlistment must be free from defects and disabilities; as a result of the involuntariness that unbeknownst is born within. Its results inevitably rights the statue intended to preserve and safeguard the properness in Armed Forces Enlistments from involuntary and unlawfulness of its agents from erroneous procurements. Lawful military status is paramount to a strong fighting force.

When an illegal transaction creates a status prejudicial to the rights of an innocent citizen, the courts are always swift to set aside the status, and will promptly rip up the transaction from beginning to end, and if necessary, to unravel ones rights; for a subsisting status as an enlisted man growing out of the forbidden enlistment for the consequences of such

enlistment under condemnation of the law, the consequences invariably pronounced upon one who was not lawfully enlisted invariably violative of public policy. It repudiates the universally accepted principal of law that an illegal act done by one person without authority, are prejudicial to the rights of an innocent stranger, especially when that act is offensive to fundamental public policy, where it is void from its inception. It subjects the rights the law gives the citizen to a status, which the law forbids the government to create. It is in this light that plaintiff's enlistment is not an offense punishable under that law. The enlistment, if an offense, is therefore the offense of a civilian.

Under our Constitution, he cannot be punished by a court-martial, after he becomes a soldier or sailor, for purely military offense[s] committed by him while a civilian. The enlistment statute, giving to it the narrowest construction, intended at least the right to contest. It follows, upon its destruction, all further right to proceed with any prosecution for purely military offenses committed during the existence of the status is taken away as effectually and completely as the repeal of a statute, creating a penal offense, strips a court of the right to proceed further, in the absence of any saving clause in the repealing act.

Recruiting officers are the government's representatives, and when they knowingly violate what Congress and the respective agency's of the Armed Forces forbade, they are subject a penalty such as a court-martial for a knowing violation of the law in this regard. See article 84, UCMJ, 10 U.S.C. § 884. Plaintiff Lanthron wholeheartedly avers that he did not seek out Mr. Carl, nor did he know that he was ineligible for any enlistment into the Armed Forces of the United States of America, in attesting to, so help me my Lord God.

Plaintiff further avers wholeheartedly that his status from civilian to military was never lawfully had under 10 U.S.C. § 802 (1) *se eq*, because [he] was statutorily prohibited as proscribed by Congress, Article 2(1) and thereby he was not amenable to the courts-martial personal jurisdiction for the alleged crimes charged to [him] under 10 U.S.C. §§ 934, and 886, articles 86 and 134 of the UCMJ. The military clearly had no jurisdiction over

him for the alleged charges, therefore his charged crimes under are a nullity and void ab initio from recruiter misconduct 10 U.S.C § 884, and of the agency's own rules and regulations regarding the procurement of ineligible for enlistments. It is further in this light that review of statute constitutionally should be favored for the plaintiff.

As Congress amended Article 2 under 10 U.S.C. 801 (a) (2); Article 2 of the Uniform Code of Military Justice while investigating the problem of "Recruiter Misconduct," article 84, 10 U.S.C. § 884, in examining the forgoing rules which, in effect voided court-martial jurisdiction where a agent for the government acting under color (recruiter) enlisted an ineligible civilian-soldier fraudulently. During Congresses amendment to Article 2, they codified the Supreme Court of the United States decision In Re Grimely, 137 U.S. 147, (1890); and the Court of Military Appeals held in United States v. Marsh, 11 M.J. 698 (N.M.C.M.R.1981) modified on reconsideration, 11 M.J. 782 (N.M.C.M.R. 1981), rev'd 15 M.J. 252 (C.M.A. 1983), and concluded that the Congressional Act as applied [namely the Amendment to Article 2] violates the ex post facto prohibition, because it deprives one charged with crime of [a] defense available according to law, at the time when the act was committed. Beazell v. Ohio, 269 U.S. 167, 169-170, 46 S. Ct. 68, 70 L. Ed. 216 (1925); for it was a real change in the laws, [and] not a mere restatement, and where "status" is not an element, Congress intended to preserve the inscription of jurisdiction in all trials notwithstanding the Article 2 amendment. "In Personam Jurisdiction" is a critical, and a fatal part of the court-martial process, which is intrinsically intertwined, and must be unequivocally affirmed in the record: Affirmed by the United States Senate Defense Authorization Act of 1980 (S. 428) at 121. See also Schlueter, Personal Jurisdiction Under Article 2, UCMJ: Whither Russo, Catlow, and Brown? The Army Lawyer, December 1979 at 3 for a discussion of the legislative history and impact of the amendments.

In plaintiff's case, "jurisdiction" was merely presumed: which in return was detrimental and fatal to his substantial constitutional rights to a fundamentally fair trial,

and to his life in general! See *Del Prado v. United States and The Judge Advocate General Of The Navy*, 23 C.M.A. 132-133; 48 C.M.R. 748-749 (1974).

Jurisdiction in all instances must be proven, **not presumed!** There are no presumptions in its favor. *Runkle v. United States*, 122 U.S. 543, 556, 7 S. Ct. 1141, 30 L. Ed. (1887); *McClaghry v. Deming*, 186 U.S. 49, 69, 22 S. Ct. 786, 46 L. Ed. 1049 (1902); *United States v. Blanton*, 7 U.S.C.M.A. 664; 23 C.M.R. 128 (1957); *United States v. Ornelas*, 2 U.S.C.M.A. 96, 101; 6 C.M.R. 96, 101 (1952).

In *United States v. Barrett*, 1 M.J. 74, 75 (C.M.A. 1977); 50 C.M.R. 493, 494 (1975), the Court of Appeals for the Armed Forces held: . . . [A]ppellant did not of his own volition seek out recruiting officer to enlist. Rather, an Army recruiter contacted appellant while he was confined and advised him to "enlist" in the Army or be removed from detention center and sent to the reform school . . . For the reasons enunciated in *Catlow*, appellant's enlistment was void at its inception . . . "[b]ecause an agent of the Government acted improperly in securing the Plaintiff's enlistment, fairness prevents the Government from now relying upon a constructive enlistment as a jurisdictional base." *United States v. Catlow*, 23 U.S.C.M.A. 142; 48 C.M.R. 758 (1974); *United States v. Martinez*, 2 M.J. 1255, 1256 (A.C.M.R. 1976); *United States v. Dumas*, 49 C.M.R. 453 (C.M.A. 1975); *United States v. Burke*, 48 C.M.R. 246 (A.C.M.R. 1974); *United States v. Brown*, 23 U.S.C.M.A. 162; 48 C.M.R. 748 (1974); *United States v. Russo*, 1 M.J. 134; 50 C.M.R. 650, 23 U.S.C.M.A. 511 (1975); *United States v. Graham*, 22 U.S.C.M.A. 75; 46 C.M.R. 75 (C.M.A. 1972); *United States v. McDonagh*, 10 M.J. 698 (A.C.M.R.), affirmed 14 M.J. 415 (C.M.A. 1983); *United States v. McGinnis*, 15 M.J. 345 (C.M.A. 1983); *United States v. Busby*, 3 M.J. 753 (N.C.M.R. 1977).

In all cases, court-martial jurisdiction cannot extend beyond the limits of Congress. See also *Dillof*, *The Involuntary Volunteer: Coerced Military Enlistments*, 25 Am. U.L. Rev. 437, 453 (1976). See also J. Horbaly, *Court-Martial Jurisdiction* 34 (1988); *Schlueter*, *The Enlistment Contract: A Uniform Approach*, 77 Mil. L. Rev. 1 (1977).

It is in this light that where the significance of court-martial jurisdiction arises; "a matter not lightly to be taken," which is an indispensable non-waivable prerequisite in court-martials, that is clearly a matter of law! And in the Rules for Court-martial [R.C.M.] 907 (b) (1) (A) specifies that the lack of court-martial jurisdiction is a nonwaivable ground for dismissal that may be raised at any stage of the proceeding.

See also *Novak v. Rumsfeld*, 423 F. Supp. 971, (ND Cal 1976); modern contract principles apply to military enlistments. *Steele v. Drummond*, 275 U.S. 199, 72 L. Ed. 238, 48 S. Ct. 53 (1927); *Burk v. Taylor*, 152 U.S. 634, 38 L. Ed. 578, 14 S. Ct. 696 (1894); *Marshall v. Baltimore & Ohio R. Co.*, 57 U.S. (16 How.) 314, 14 L. Ed. 953 (1853); and because enlistments contrary to Congresses intents are not in the public interest where "recruiter misconduct" amounts to a violation of the fraudulent enlistment statute Article 84, Uniform Code of Military Justice, 10 U.S.C. § 884; such enlistment as plaintiff's is void as contrary to public policy. Enlistment of a statutorily ineligible is void ab initio effected through the deliberate violation of recruiting regulations by the recruiter. Hence, the change of status alluded to in *re Grimley*, 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890), never occurred in plaintiff's case. *United States v. Barrett*, 1 M.J. 74, 75 (C.M.A. 1977); *Runkle v. United States*, 122 U.S. 543, 556, 7 S. Ct. 1141, 30 L. Ed. 2d 1167 (1887).

Moreover, in plaintiff's case, the jurisdictional rule was never followed as laid down in *United States v. Ornelas*, 2 U.S.C.M.A. 96; 101, 6 C.M.R. 96, 101 (1952), where the Court should decide, as part of their determination of guilt or innocence, whether the accused had been validly inducted into the Army. Absent formalities of valid enlistment contract, court-martial jurisdiction over alleged service member should be exercised only where Government has not acted unfairly in first instance in placing such a person in the military environment. Article 2(1) UCMJ, 10 U.S.C.A. § 802(1). It is clear that plaintiff's original enlistment contract was void as a jurisdictional base due to his statutory incapacity to contract for military service. 10 U.S.C. §§ 504, 505(a) (1970); *United States v. Williams*,

302 U.S. 46, 58 S. Ct. 81, 82 L. Ed. 39 (1937). See also, *Violations By Agencies of Their Own Regulations*, 87 Harv. L. Rev. 629 (1974).

Jurisdiction is a sacred inherent alienable right of every citizen, and when one is being tried for there life and liberty, it must affirmatively and unequivocally be proven; and where it has not been proven, then it is clearly lacking. "There can be no question of prospective or retrospective application;" for when courts-martial proceeds without jurisdiction, its actions are null and void ab initio, and the consequences of such injuries imposed are of constitutional lifelong dimension to the misfortunate soul. *United States v. United States Coin & Currency*, 401 U.S. 715, 723, 91 S. Ct. 1041, 1046, 28 L. Ed. 434 (1971); *Linkletter v. Walker*, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965); *Davis v. United States*, 417 U.S. 333, 94 S. Ct. 2298, 41 L. Ed. 2d 109 (1974).

Plaintiff Lanthron continues on an ongoing basis, to suffer from the persistence of prejudice attendants upon such a void conviction, and the requirements of justice in his particular case furnish a sound basis for the Court to do justice, to one who has been made to suffer from the flagrant overt actions of the Government.

Plaintiff further attests under Oath before our Lord God and this Court, that he knew nil of his disability statutorily impediments to valid enlistment inasmuch as signing the enlistment papers from his jail cell: [for] no one told him to the contrary that, the overt actions of the agent for the government acting under color was constitutionally infirm!

Courts-Martial Jurisdiction

18. A court-martial organized under the laws of the United States, is a court of special and limited jurisdiction. It is called into existence for a special purpose and for the performance of a particular duty. That its sentences may be recognized it must appear affirmatively and unequivocally that the court which rendered them was constituted according to law, that it had jurisdiction, that it complied with all the statutory regulations governing it, and that its sentence conformed to law. *Runkle v. United States*, 122 U.S.

543, 555, 7 S. Ct. 1141, 30 L. Ed. 1167 (1887). Its authority is derived from the statute, and it must proceed in conformity therewith. Being an inferior court of limited jurisdiction its judgments may be attacked collaterally, and the validity of its proceedings may be called into question upon a proper hearing. It is a cardinal rule of construction that effect is to be given, if possible, to every word, clause, and sentence of the statute. *McClaghry v. Deming*, 186 U.S. 49, 69, 22 S. Ct. 786, 46 L. Ed. 1049 (1902); *Carter v. Roberts*, 177 U.S. 496, 498, 20 S. Ct. 713, 44 L. Ed. 861 (1900). If the proceedings of a court-martial are void, and its sentence is a nullity, on the ground that the court-martial was without jurisdiction, it needs no argument to establish the fact that his status as an enlisted man was not lawfully changed in contemplation of law in any particular by reason of the sentence imposed. A void sentence can no more affect the status of the person upon whom it is pronounced than a void judgment can affect the property against which it is rendered. In *re Bird*, 3 Fed. Cas. 425, No. 1,428, (D. Ore. 1871).

It follows that a tribunal lacking jurisdiction, its proceedings and sentence become a nullity, and must be treated as an absolute nullity as being void ab initio.

The test for whether one is amenable to court-martial jurisdiction "is one of status, namely, whether the accused in the court-martial proceeding is a person who can be regarded as falling within the term 'land and naval forces.'" *Solorio v. United States*, 483 U.S. 435, 439, 97 L. Ed. 2d 364, 371, 107 S. Ct. 2924 (1987), quoting *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 240-241, 4 L. Ed. 2d 268, 80 S. Ct. 297 (1960).

In *Wise v. Withers*, 7 U.S. (3 Cranch) 331, 2 L. Ed. 457 (1806), the Supreme Court held that the decision of a court-martial that a certain justice of the peace in the District of Columbia was not an officer of the United States, and was therefore a proper subject for Military duty, was not binding in action for trespass di bonis asportatis against the members of the court and the officer whom they sent to seize goods to pay a fine for failure to report which and been levied by the court-martial. The argument was made by counsel for the

defendant that the decisions of a court-martial were "final and conclusive like those of an ecclesiastical court..", but the Supreme Court, through Marshall, C.J., held that in any action the Court may review the jurisdiction of a court-martial, and if it has acted without any jurisdiction, the Court may so decide and enter judgment accordingly. The Supreme Court found that "the court and the officers are all trespassers," *id.* At 337. While it is true that this case involved the federal militia, and not the regular armed forces, there is no legal reason for distinguishing the cases, as the power of Congress over the federal militia was as great as over the Army. See also *Houston v. Moore*, 5 (U.S.) Wheat 1, 18 U.S. 1, 5 L. Ed. 19 (1820) (Review of State militia court-martial jurisdiction through trespass); *Martin v. Mott*, 12 (U.S.) Wheat 19, 25 U.S. 19, 6 L. Ed. 537 (1827) (Review of federal court-martial jurisdiction over state militia man called to federal service, through replevin).

The above cases dealt with challenges to the jurisdiction of courts-martial over persons who alleged that they were not really in service when tried at all.

In *Dynes v. Hoover*, 20 (U.S.) How. 65, 61 U.S. 65, 15 L. Ed. 838 (1857), the Supreme Court reviewed an assault and battery-false imprisonment action by a Navy seaman against his jailers. He had been sentenced to imprisonment by a court-martial, and through the Court affirmed the actions of the court-martial in Dynes particular case, it held that such an action would lie if the court-martial had been without either subject matter or personal jurisdiction as had been alleged, even though Dynes was clearly in service at time. It is interesting to note that Dynes sentence had apparently been served prior to the bringing of the action, so that habeas corpus would not have been available, but this was seen by the Court as any impediment to collateral attack on the court-martial conviction.

Statute of Limitations

19. Under 28 U.S.C. § 2401 in plaintiff's case: should not at least begin to run until the merits has been reached in his cause of action, because he clearly has been due diligent in seeking relief! Clearly, to apply it to his rare case would clearly work an injustice against

him, thereby causing further injury to his life. *Kaiser v. Secretary of the Navy*, 525 F. Supp. 1226, 1228 (D. Colo. 1981); *Wood v. Secretary of Defense*, 496 F. Supp. 192, 198 (1980); *Macklin v. Spector Freight Systems, Inc.*, 156 U.S. App. D.C. 69; 478 F.2d 979, 994 & n. 30 (D.C. Cir.1973); *Dougherty v. U.S. Navy Board for Correction of Naval Records*, 784 F.2d 499, 501 (3d Cir. 1986).

There is an implicit exception from time bars such as 28 U.S.C. § 2401 for certain kinds of relief from criminal convictions. The most important example is habeas corpus: "in habeas corpus, there is no statute of limitations, no res judicata, and [the] doctrine of latches is inapplicable." *Heflin v. United States*, 358 U.S. 415, 420, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959) (Stewart, J., concurring). Other examples of relief from criminal convictions not subject to time bars include coram nobis and relief under 28 U.S.C. § 2255. There are also several less used routes in which plaintiff also in futile sought, 28 U.S.C. § 2255 save clause, 28 U.S.C. § 2241(c) (3). See, e.g., *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116, 76 S. Ct. 223, 100 L. Ed. 126 (1956) (1945 conviction), *Palmer v. Ashe*, 342 U.S. 134, 72 S. Ct. 191, 96 L. Ed. 154 (1951) (1931 conviction); *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935) (directing petitioner to seek state habeas corpus for 1917 conviction).

In some of the habeas cases, the relevant statute of limitations, if one were applicable, would be a state law rather than 28 U.S.C. § 2401, see *Holmberg v. Armbrrecht*, 327 U.S. 392, 66 S. Ct. 582, 90 L. Ed. 743 (1946), but this has never been viewed as material. To determine the availability of the exceptions allowing corrective relief from a criminal conviction, it must be considered in the historical and practical bases for the exception. At common law, such collateral challenges were available only on the ground that the conviction was void. See *Stone v. Powell*, 428 U.S. 465, 475-76 & n.9, 97 S. Ct. 197, 50 L. Ed. 158 (1976); *Culver v. Secretary of Air Force*, 182 U.S. App. D.C. 1, 9; 559 F.2d 622, 630 (1977)); *Avrech v. Secretary of the Navy*, 171 U.S. App. D.C. 368, 370-371 n.5; 520

F.2d 100, 102-103 n.5 (1975). The doctrine applied to annulment of less-than-honorable discharges. See *In re Bird*, 3 Fed. Cas. 425, 427 (D. Ore. 1871). "The theory underlying the concept of a void judgment is that it is legally ineffective – a legal nullity; and may be vacated by the court which rendered it at any time (assuming they have lawful jurisdiction to do so). When actions brought primarily for damages have been held consistently to be subject to the statute; habeas corpus petitions on the other hand have been held with equal consistency not to be subject to time bars. As to actions brought primarily for corrective relief, the courts have consistently entertained corrective actions for less-than-honorable court-martial (see) *Secretary of the Navy v. Flemmings in Gosha* at 413 U.S. 665 (1973) (1946 discharge); *Homcy v. Resor*, 147 U.S. App. D.C. 277; 455 F.2d 1345 (1971) (1944 discharge); *Ashe v. McNamara*, 355 F.2d 277 (1st Cir. 1965) (1948 discharge); *Lima v. Secretary of the Navy*, 314 F. Supp. 337 (E.D. Pa. 1970) (1945 discharge); *Baxter v. Claytor, JR., Secretary of the Navy*, 209 U.S. App. D.C. 188; 652 F.2d 181 (1981) (1956 discharge); or administrative designations which time bars would have foreclosed. See, e.g., *Robinson v. Resor*, 152 U.S. App. D.C. 204; 469 F.2d 944 (1972) (1955 discharge).

Administrative discharges use term somewhat different from court martial discharges, and are imposed by the military administrative system rather than the military judicial system. However, the grounds for such discharges, and the impacts of the discharges, are comparable. Comment, *Punishment of Enlisted Personnel Outside the Uniform Code of Military Justice: A Statutory and Equal Protection Analysis of Military Discharge Certificates*, 9 HARV C.R. C.L. REV. 227 (1974). Corrective relief for the two types of discharges has been treated alike. See *McGrath v. Iristensen*, 340 U.S. 162, 168-171, 71 S. Ct. 224, 95 L. Ed. 173 (1950); *Harmon v. Brucker*, 355 U.S. 579, 78 S. Ct. 433, 2 L. Ed. 503 (1958); *Bland v. Connally*, 110 U.S. App.D.C. 375; 293 F.2d 852 (1961); *Beard v. Stahr*, 370 U.S. 41, 42, 82 S. Ct. 1106, 8 L. Ed. 2d 321 (1962); *Mulvaney v. Stetson, Secretary of the Air Force*, 544 F. Supp. 811 (1982); *Green v. White, Secretary of the Army*, 319 F.3d 560

(2003).

Moreover, in doing so, courts have assumed that older discharges would be subject to corrective action. See *Gosha v. Mayden*, 413 U.S. 665, 670, n.3, 93 S. Ct. 2926, 37 L. Ed. 2d 873 (1973).

The corrective action as it has evolved to its present legal form follows principals of habeas corpus actions rather than damage actions. Extensive research has uncovered the basic reason for the evolution of the corrective action to its present form is the impact on the ex-serviceman of a less-than-honorable discharge. This designation "results in an unmistakable social stigma," *Bland v. Connally*, 110 U.S. App. D.C. 375, 381; 293 F.2d 852, 858 (1961). In observing the past four and a half decades, such a designation "greatly limit's the opportunities for both public and private civilian employment," *id.* At 858, which is confirmed by studies of such. See Jones, *The Gravity of Administrative Discharges*, 59 MIL. L. REV. 1 (1973); and comment at 278, n.213 and 303 n.331 (listing statutory restrictions on benefits). These effects were the reason for a special discharge review program. See generally National Military Discharge Review Project, *Practice Manual on the Department of Defense Special Discharge Review Program for Vietnam-Era Veterans*, 4 M.L.R. 6017 (1976). The designation also "means the loss of numerous benefits in both federal and state systems," *id.* At 858. In the seminal case of *Homcy v. Resor*, 147 U.S. App. D.C. 277; 455 F.2d 1345 (1971) (opinion by MacKinnon, J.), it was concluded from these factors that "the deprivation of liberty under an invalid conviction is a grievous injury, but a military discharge under other than honorable conditions imposes a lifelong disability of greater consequences." 147 U.S. App. D.C. at 281; 455 F.2d at 1345. The Court's observation has been cited with the approval by the Supreme Court. See *Kauffman v. Secretary of the Air Force*, 135 U.S. App. D.C. 1013 (1970); *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975), which declared that "[restraint]" on liberty, although perhaps the most immediately onerous, is not the only serious consequence of a court-martial

conviction. Such convictions may result, for example, in deprivation of pay and earned promotion, and even in discharge or dismissal from the service under conditions that can cause lasting, serious harm in civilian life: a lifelong disability lasting, in continuous injury and harm to ones life, liberty and freedom. In *Casey v. United States*, 8 Cl. Ct. 234, 241 (1985) (quoting *Birt v. United States*, 180 Cl. Ct. 910, 914 (1967)). The Claims Court reasoned that: Our primary concern in these cases is to prevent the Armed Forces from imposing a penalty on a discharged serviceman without affording him some basic constitutional protection, the essence of which is notice and a hearing . . . We will not permit the imposition of a stigma without respect for even the most elementary notions of due process of law [in which plaintiff has not been afforded to date]. The Claims Court concluded that to brand the plaintiff on his discharge certificate as a drug abuser was "one more reason why this Court finds that the Army acted in an arbitrary and capricious manner in discharging him as it did." *Id.* At 242. Further, the Claims Court concluded that although the codes are private information known only within the Department of Defense and not to the public at large, the most important segment of society, i.e., prospective employers, do know and understand the importance of separation codes. "Thus, discharges that include stigmatizing and derogatory information must only be given to servicemen who have been afforded elementary due process rights." *Id.* At 243.

Plaintiff's cause of action is one that accrues continually, as long as the merits of his discharge designation record remain unchallenged in light of *Baxtor v. Claytor, JR.*, Secretary of Navy, 209 U.S. App. D.C. 188; 652 F.2d 181 (1981), in which his case is clearly distinguishable from *Baxtor's*, because he has been diligently pursuing remedies for more than a decade for relief. Note, in *Urban Law Institute of Antioch College, Inc. v. Secretary of Defense*, Civ. No. 76-0530 (D.D.C. August 23, 1978), this Court required the services to notify former serviceman of their right to a new review. Plaintiff Lanthron received no such notice for such a review [notwithstanding that he was an alleged former

service member!].

This Court should conclude as a matter of law that actions for corrective relief are properly viewed as within the exception from time bars applicable to some forms of relief from criminal convictions; specially in plaintiff's at bar! On occasion, interest in finality give way to the interests of the mis-convicted in constructional liberty.

Laches

20. Laches of a party cannot cure a judgment that is so defective as to be void; "laches cannot infuse the judgment with life." 7 MOORE'S FEDERAL PRACTICE P60.25 [4], at 215 (1975). In plaintiff's particular case, the Government would not be unduly prejudiced, because he has been the one from inception, who has, and continually is being prejudiced against; and a mere lapse of time does not amount to laches. *Socony Mobile Oil Co. v. Continental Oil Co.*, 335 F.2d 438 (10th Cir. 1964). Furthermore, plaintiff did not know that he was being hurt by the injurious and detrimental dealings of the agents for the government, until afterwards! And he has not been unreasonable in delay in trying to enforce his protected legal rights. Moreover, plaintiff's delay in bringing suite was clearly not intentional, and the law regarding personal jurisdiction, and court-martial jurisdiction was not developed as it is today in time by Congresses' authority; and the record in toto unequivocally shows no intentional abandonment of known rights under familiar principles of waiver. See *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 n.4 (1938).

Time Factor

21. The power to hurdle a time factor. See *Farnsworth v. United States*, 98 U.S. App. D.C. 63; 232 F.2d 59, 63 (1956). "If a petitioner has been denied a fundamental constitutional right, [like plaintiff has clearly been] the passage of time will not preclude him from relief." Accord, *Kyle v. United States*, 323 F.2d 180 (2d Cir. 1961); *Amato v. Chafee*, 337 F. Supp. 1214, 1216, 1217 (D.D.C. 1973); *Walters v. Secretary of Defense*, 233 U.S.

App. D.C. 148; 725 F.2d 107 (D.D.C. Cir. 1983); 533 F. Supp. 1068, 1071 n.6 (D.D.C. 1982); *United States v. Morgan*, 346 U.S. 502, 74 S. Ct. 247, 98 L. Ed. 248 (1954).

Tolling

22. Tolling is appropriate only when the existence of administrative relief "prevents the pursuit or exercise" of judicial remedies. *Martinez v. Brown*, 449 F. Supp. 207, 210 (N.D. Cal. 1978); *Mosley v. Secretary of the Navy*, 522 F. Supp. 1165 (E.D. Pa. 1981); *Corson v. First Jersey Securities, Inc.*, 537 F. Supp. 1263, 1268 (D.N.J. 1982); *Walters v. Secretary of Defense*, 233 U.S. App. D.C. 148; 725 F.2d 107, 114 (D.C. Cir. 1983); *Ridgely v. Marsh*, 275 U.S. App. D.C. 408; 866 F.2d 1526, 1530 (D.C. Cir. 1989); *Ortiz, JR.; Plowman v. Secretary of Defense; Secretary of the Army*, 309 U.S. App. D.C. 342; 41 F.3d 738 (1994). See, e.g., *American Pipe & Construction Co., v. Utah*, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974) (commencement of class action tolls federal statute of limitations); *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 85 S. Ct. 1050, 13 L. Ed. 2d 941 (1965) (commencement of state action, even in court where venue is improper tolls federal statute of limitations); *United States v. Dickinson*, 331 U.S. 745, 748-749, 67 S. Ct. 1382, 91 L. Ed. 1789 (1947) (cause of action for a "taking" by flooding accrues for purposes of 28 U.S.C. § 2401 when flooding from federal dam occurs, not when dam is built). In *Crown Coat Front Co. v. United States*, 386 U.S. 503, 18 L. Ed. 2d 256, 87 S. Ct. 1177 (1967), a contract case, the Supreme Court reviewed a claim in which six years had passed from the date of the alleged breach of contract, but the contractor had exhausted his administrative remedies. The Court stated, "if the time bars starts running from the completion date, the contractor could thus be barred from the courts by the time his administrative appeal is finally decided. This is not an appealing result, nor in our view, one that Congress intended." *Id.* At 514. See also *Vietnam Veterans of America v. Secretary of the Navy*, 269 U.S. App. D.C. 35; 843 F.2d 528, 531; 642 F. Supp. 154 157 (D.C. Cir. 1988); *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990); *Young v. United*

States, 533 U.S. 43, 49-50, 122 S.Ct. 1036, 152 L. Ed. 2d 79 (2002); *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002). Since it is Congress, not the judiciary, which has the power to waive sovereign immunity, the courts must be careful not to extend such a waiver beyond the scope intended by Congress. See *United States v. Sherwood*, 312 U.S. 584, 587-588, 61 S. Ct. 767, 770, 85 L. Ed. 1058 (1941). In enacting the legislation which led to the creation of discharge boards and bureaus for correction of records in each branch of the military. See 10 U.S.C. §§ 1552, 1553, Congress did not intend to affect the jurisdiction of the courts. *Ogden v. Zuckert*, 111 U.S. App. D.C. 398; 298 F.2d 312, 315 (D.C. Cir. 1966).

Plaintiff Lanthron presents a different argument premised not on the general regards concerning the time of accrual of a cause of action, but on the "continuing injury" doctrine. See, e.g., *Macklin v. Spector freight Systems, Inc.*, 156 U.S. App. D.C. 69, 84; 478 F.2d 979, 994 (1974); *Cooper v. United states*, 442 F.2d 908, 911 (7th Cir. 1971); *Fitzgearld v. Seamans*, 180 U.S. App. D.C. 75, 85; 553 F.2d 220, 230 (1977); *Homcy v. Resor*, 147 U.S. App. D.C. 277, 281; 455 F.2d 1345, 1349 (1971); *Kaiser v. Secretary of the Navy*, 525 F. Supp. 1226 (1981); *White v. Secretary of the Army*, 278 U.S. App. D.C. 399; 878 F.2d 501 (1989); *Schlesinger v. Councilman*, 428 U.S. 738, 746-753, 43 L. Ed. 2d 591, 606 (1975).

In considering the statute of limitations in connection with the law concerning record correction; such a statute serves two overriding purposes, which neither supports a ruling that plaintiff's cause of action accrues once at an early date, but rather than until the present challenge to his record was initiated because, a statute of limitations provides repose, so that persons can live in peace without concern that their lives and plans will be upset by the surfacing of old, long-forgotten disputes. In Plaintiff's rare case, it has been going on since at least 1974. Clearly, provision of repose has no application to his case. The Secretary of Navy is the nominal defendant in his case; and the United States, for practical purposes is the real defendant. Neither the Secretary nor the United States

requires corrective actions lapse so that each can enjoy "repose." The Secretary's peace is not disturbed by his nominal status in corrective actions, and it would be an anthropomorphic fiction to maintain that the Navy or the United States suffers from anxiety at the prospect that corrective actions can be brought at a late date. Such fictions will not be indulged when the defendants continue to maintain records whose ongoing impact on plaintiff's life is actual, real, and severe, constituting an unmistakable barrier to his employment, a basis for denial of needed government benefits, and the source of real social stigma.

The second purpose of the statute of limitations is to avoid stale claims. "Statute of limitations, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 348, 349, 64 S. Ct. 582, 88 L. Ed. 788 (1944). That evidentiary purpose has no bearing on a cause of action, like the plaintiff's to correct his records on the basis of an assertion of law. To the extent that staleness considerations favor limiting some kinds of old corrective claims, rather than early running of the statute of limitations, which provide the degree of limitation that may be appropriate. See also, *United States Of America v. Ronald Lanthron*, United States Court of Appeals for the Fourth Circuit, Nos. 01-7596, 02-6002, June 05, 2002; May 20, 2003, United States District Court for the Eastern District of North Carolina, CA-01-465-5, June 20, 2001.

Estoppel

23. Where a recruiter or other misconduct by Government agents may affect whether a court will apply the doctrine of constructive enlistment depends on several factors: if the recruiter's conduct is grossly negligent, the court could decide that such negligence estops the Government from arguing constructive enlistment, and such being is tantamount to

actual malfeasance; and fairness also prevents the government to argue otherwise. Thus, if the recruiters' conduct constitutes malfeasance, amounting to a violation of article 84, UCMJ, 10 U.S.C. § 884, the enlistment is void. See *United States v. Russo*, 1 M.J. 134 (C.M.A. 1976); *United States v. Harrison*, 5 M.J. 476 (C.M.A. 1978); *United States v. McDonagh*, 10 M.J. 698 (A.C.M.R. 1981), affirmed 14 M.J. 415 (C.M.A. 1983); *United States v. Barrett*, 1 M.J. 74, 75 (C.M.A. 1977); *United States v. Burke*, 48 C.M.R. 246 (1974); *United States v. Jessie*, 5 M.J. 573, 574 (A.C.M.R. 1978).

In the case of *Springer v. Shavender*, 118 N. Car., 33, 23 S. E. 976, 54 AM. St. Rep. 708 (1896), it is said: "Nothing but a valid judgment will operate as an estoppel upon anyone." And in the case of *Morton v. Shelby & Co.*, 118 U.S. 441, 6 S. Ct. 1121, 30 L. Ed. 178 (1886) they held, in effect, that an unconstitutional act is not a law. It confers no rights, affords no protection, and creates no office; and in the case of *State v. Jennings*, 24 Kan. 642, 654 (1881), the court enunciated that, "A judgment rendered upon a void thing would be virtually rendered upon nothing; it would be given without jurisdiction, and having nothing to stand upon, would itself be void;" and estop the government from disputing his rightful status upon any fact existing at the time the Court, either grants a hearing or renders its judgment without such. *Freeman on Judgments*, 324; *U.S. v. Chung Shee*, 71 Fed. 277 (1895); *Weir v. Marely*, 99 Mo. 484; 12 S.W. 798, 6 L.R.A. 672 (1889); *People v. Mercein*, 3 Hill. 399; 38 Am. Dec. 644 (1842); *McConologue's* 107 Mass. 154, 170 (1871); *Ex parte Van Vranken*, 47 F. 888 (1891).

Actions of Boards For Review and Correction of Certain Military Discharges

24. After World War II, Congress created military discharge review and correction boards, with the continuing duty to correct discharge records. The Court is to set aside the BCNR and AFCBMR actions if it finds them to be "arbitrary, capricious, and abuse of discretions, or otherwise not in accordance with the law." 5 U.S.C. § 706.

The Secretary of a military department may correct any military record when the

Secretary considers it necessary to correct an error or remove an injustice. 10 U.S.C. §§ 1552 & 1553. The review process under the appropriate standard, which is whether the Board determines that evidence presented, demonstrates "the existence of probable material or injustice." The Secretaries agree that the Court's review of when the Correction Board's three-year statute of limitations begins to run is *de novo*. *Transohio Sav. Bank v. Director, Office of Thrift Supervision*, 296 U.S. App. D.C. 231; 967 F.2d 598, 614 (D.C. Cir. 1992) contradicting the Army's regulation requiring exhaustion.

Plaintiff has more than adequately exhausted all available remedies as required. 5 U.S.C. § 704; 32 C.F.R. § 581.3(c)(3) (1994), and given the remedial nature of the administrative scheme for correction of erroneous or unjust dismissals and discharges, there is a presumption in favor of having the merits of such claims heard. *Van Bourg v. Nitze*, 128 U.S. App. D.C. 301; 388 F.2d 557, 565 (D.C. Cir. 1967); *Gottlieb v. Peea*, 41 F.3d 730 (1994) (Correction Board considered the merits of application to reconsider its previous decision, made earlier in time); *Swann v. Garrett*, 811 F. Supp. 1336, 1337-1338, 1343 (N.D. Ind. 1992). (Correction Board decided application regarding events that occurred forty years earlier) otherwise it would be apparent in unjust enrichment – a complete miscarriage of justice.

The Services are bound to follow their own regulations. *Service v. Dulles*, 345 U.S. 363, 388, 1 L. Ed. 2d 1403, 77 S. Ct. 1152 (1957); *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 267, 98 L. Ed. 681, 74 S. Ct. 499 (1954).

Also, under the Privacy Act of 1974, all federal agencies were charged with the duty to maintain records with "accuracy, relevance, timeliness, and completeness," 5 U.S.C. §552a (e)(5) & (g)(1)(C). The Navy interprets the Privacy Act to its records, 32 C.F.R. § 701.117, and specifically to require correction of a discharge designation which is unsupported by a valid court martial judgment. See *Stichman, Developments in the Military Discharge Review Process*, 4 M.L.R. 6001 (1976); and in *Homcy v. Resor*, 147 U.S. App. D.C. 277;

455 F.2d 1345 (1971), it would be senseless to consider Homcy's record to have been "accurate" when it designated his distinguished military career as dishonorable based on an invalid court martial whose conclusions were the result of command influence.

The purpose of a record (of a military discharge, for example), is its availability for continuing reference, most fitting where, as here, the content of the plaintiff's record has numerous collateral consequences. The continuing impact on legal rights of administrative and arrest records, and the necessity of continually correcting them if need be to accord with justice, has been frequently discussed. See *Chastin v. Kelly*, 167 U.S. App. D.C. 11, 14; 510 F.2d 1232, 1235 (1975); *Tarleton v. Saxbe*, 165 U.S. App. D.C. 293; 507 F.2d 1116 (1974); *Morrow v. District of Columbia*, 135 U.S. App. D.C. 160; 417 F.2d 728 (1969). Compare *Paul v. Davis*, 424 U.S. 693, 706, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976) (records without effects on legal rights); *Finley v. Hampton*, 154 U.S. App. D.C. 50; 473 F.2d 180 (1972) (same). See also *Cooper v. Marsh*, 807 F.2d 988 (1986); *Smith v. Marsh*, 787 F.2d 510 (1986). Moreover, the statute of limitations has been deemed tolled in suits based on university records labeling a student as a "dope pusher," and suits based on derogatory credit records. *Hepperle v. Johnston*, 544 F.2d 201 (5th Cir. 1976) (student record); *Polin v. Dun & Bradstreet, Inc.*, 511 F.2d (10th Cir. 1975) (credit record). See also, *Menard v. Saxbe*, 162 U.S. App. D.C. 284; 489 F.2d 1017 (1974); *Utz v. Cullinane*, 172 U.S. App. D.C. 67; 520 F.2d 467 (1975).

In *Williamson v. Secretary of the Navy, et al.*, 395 F. Supp. 146 (1975), that, while plaintiff completed the military process in attacking his court martial and his conviction is final, the government claims that he has not exhausted his military remedies. The government argues that plaintiff could apply for relief from the Navy Discharge Review Board, and if relief were not granted there, to the Board for Correction of Naval records. See 10 U.S.C. §§ 1552, 1553; 32 C.F.R. Parts 723-724. This Court concluded that, "while both boards may review the bad conduct discharge awarded at the special court martial, the

government concedes that neither board is empowered to review plaintiff's court martial conviction as such and award the full relief which plaintiff seeks from this Court." Therefore, this Court concludes that plaintiff Williamson has effectively exhausted his military remedies.

Circumspection with Regard to Old Evidence

25. Some challenges to court martial convictions involve review of old evidence. In some instances, this may prejudice the state since the state may have difficulty producing witnesses or evidence at a late date to controvert the factual assertions of the former defendant. Courts have dealt with this in habeas corpus, coram nobis, and corrective actions by a measure of circumspection in the review of old evidence. Although, at times such circumspect review is a demanding task there is no substitute for it in the interest of justice to be served. For example, in *United States v. Cariola*, 323 F.2d 180 (2d Cir. 1963), the court allowed a coram nobis challenge to a twenty four year old conviction to proceed. On the merits, upon circumspect analysis of the issues raised, it upheld the conviction. Circumspection of this kind has been particularly evident in challenges to old military convictions. In *Baker v. Schlesinger*, 523 F.2d 1031 (6th Cir. 1975), cert. Denied, 424 U.S. 972 (1976) a corrective action for a 1947 discharge, the plaintiff presented a recent deposition of his original court-martial counsel to show the difficulties faced by counsel at the court martial. The District Court granted relief, but the Court of Appeals reversed, finding upon close scrutiny that counsel's various difficulties were either non-prejudicial or justifiable against the background of postwar European conditions. In another example, in *Lanthron v. United States*, United States Navy-Marine Corps Court of Criminal Appeals, (March 08, 1996) No. 9502052, the Court allowed a challenge for coram nobis relief to a 25 year old case. However, the Court denied relief on the merits. Plaintiff just most recently had learned that, because he had never had an appeal in the Court of Military of Appeals, he could not get relief from this Court; a judicial futility!

Plaintiff's suit is based on the purely legal question of whether the special court-martial had lawful personal jurisdiction over him, and was his enlisted lawful, and were all of the intra military reviews in accordance with the law, and the substantial evidence; and were his constitutional rights violated under the Fifth and Sixth Amendments of the Constitution.

The transcript of his court martial is denude of the indispensable prerequisite of jurisdiction that is required to even try him at all. Therefore it provides a clear bases for this Court to hold that [his] substantial constitutional rights were clearly violated beyond dimension.

From the examination of the law concerning correction of a discharge based upon a conviction lacking jurisdiction, and other government records, this Court should conclude as a matter of law, that the practical ends to be served make plaintiff's cause of action one which accrues continually until correction in the particular peculiar circumstances of his case are correct.

For over a century, court martial convictions impose lifelong "continuing punishments," besides imprisonment, for which executive relief is available on a continuing basis. They call for the Court to circumspect [his] record and note, that the critical considerations for the seriousness of the collateral consequences flowing directly from his unconstitutional federal special-courts martial conviction. *Bradley v. Laird*, 449 F.2d 898 (10th Cir. 1971).

Plaintiff Lanthron prays for the Court to conclude, that his discharge record rises to a cause of action which extends the period within which he can seek judicial relief from his injury. His reputational liberty interest: "stigma" attached to his discharge and records designation of the discharge, which clearly presents a derogatory connotation to the public at large affecting his life, liberty, and employment ability.

His private interests are affected by the unconstitutional official actions, and he is always at risk of an erroneous deprivation of such interest through the procedures used in staining and branding him for life!

Plaintiff should be afforded a remedy for such unjust erroneous deprivation, which would comport with due process as a matter of law. *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972). See also *Zinermom, et al. v. Burch*, 494 U.S. 113, 110 S. Ct. 975, 984, 108 L. Ed. 2d 100 (1990). Challenges to court martial convictions sometimes involve development of constitutional law subsequent to the conviction.

The deliberate and arbitrary abuse of government power has violated his right to substantive due process, and relief should be afforded him where governmental action has been prejudicial, arbitrary, irrational, or not in conformance to law; or tainted by improper motive.

In the bright light of the foregoing, this Court has a clear base to hold that plaintiff's conviction was in violation of the Constitution of the United States, and the government had no lawful authority to impose its baleful action[s] upon [him]. It follows that his enlistment and induction were unlawful, then he was not legally within the United States Marine Corps, and hence, he was not eligible to its courts-martial jurisdiction.

Accordingly, plaintiff could not be tried for the purely military offenses against him by court-martial, and relief should be accorded because the continuation of the conviction's collateral consequence can no longer be justified in constitutional terms. Clearly his enlistment, and special court martial conviction is contrary to Congresses authority, and therefore is a legal novelty which is void.

Jurisdiction of this Court should be clearly sustained in light of the basis that, plaintiff Lanthron's enlistment and induction were unlawful, because they were unauthorized by statute, and his status never being cured as within the meaning as being statutorily lawful, therefore the entire fiscal was unlawful as a matter of law.

The Courts have held, that where the error or defect is jurisdictional, however, the normal rule is that such a defect cannot be cured by waiver. *United States v. Griffin*, 303 U.S. 226, 58 S. Ct. 601, 82 L. Ed. 764 (1938); *McClaghry v. Deming*, 186 U.S. 49, 22 S. Ct. 786, 46

L. Ed. 1049 (1902).

Plaintiff Lanthron is clearly labeled with the "unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment" associated with such discharge. *Bland v. Connally*, 110 U.S. App. D.C. 375; 293 F.2d 852, 858 (D.C. Cir. 1961); *Baxter v. Claytor*, 209 U.S. App. D.C. 188; 652 F.2d 181 (D.C. Cir. 1981); *Van Bourg v. Nitze*, 128 U.S. App. D.C. 301; 388 F.2d 557 (D.C. Cir. 1967). As it is, because of his lifelong treatment by the government, he is a "marked man." As such, he is not free to pursue various professional occupations, and many more things in life generally as free people do in our Country, "The United States Of America."

Plaintiff Lanthron was forced to delay in bringing this action because of his constitutionally ineffective counsel in the special court-martial proceedings, (believing him wholeheartedly) and the case law on personal jurisdiction not being fully developed until after the challenge action took place. Cf. *Baxter v. Claytor*, supra at 185. His lack of ability or opportunity in discovering the injury; and only upon due diligence in developing his record had he learned, and has been on an odyssey ever since: through the enormous complexities of law. Clearly in plaintiff's case, the military had no colorable authority whatsoever upon which to rely for the assertion of courts-martial jurisdiction over him as a civilian.

Standard of Review

26. Federal Rule of Civil procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The "very mission" of summary judgment is "to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." If wisely applied, the summary judgment procedure will eliminate useless trials. Summary Judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled

to judgment as a matter of law. Fed. R. Civ. P. 56. A genuine issue of material fact is one that might affect the outcome of the suit under governing law. In reviewing a motion for summary judgment, the evidence of the non-movant is to be believed, and, all justifiable inferences are to be drawn in his favor. A genuine issue of material fact is one that "might affect the outcome of the suit under governing law." The standard for summary judgment is similar to that for a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); *Kramer v. Secretary of Defense*, 39 F. Supp. 2d 54 (1999).

In light of plaintiff's lifelong sufferings from the void court-martial conviction, this Court should not hesitate to exercise its grand hand in "the protection of individuals erosion of their right to be free from wrongful restraints upon their liberty," (quoting a habeas corpus action) in *Jones v. Cunningham*, 371 U.S. 236, 9 L. Ed. 2d 285, 83 S. Ct. 373 (1963). To do otherwise would be to exalt fiction over reality, because of the attendant collateral consequences flowing directly from the void conviction, that continues to bear directly on him, and his good name: Ecclesiastes 7:1. *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 626, 67 L. Ed. 1042 (1923); *Zinerman, et al. v Burch*, 494 U.S. 113, 110 S. Ct. 975, 984, 108 L. Ed. 2d 100 (1990); *Hannon v. Turnage*, 892 F.2d 653, 660 (7th Cir. 1990); *Coleman v. Thompson*, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991).

Plaintiff Lanthron therefore prays, that from the ongoing baleful injuries to his life, to move the Honorable Court in the interests of justice, "to see that substantial justice is done by reaching the ends of justice," and grant one who is truly innocent his true day in Court. *Board of Education, City of Cincinnati v. Department of H.E.W.*, 655 F. Supp. 1504, 1547 (S.D. Ohio 1986).

Relief Respectfully Requested

27. WHEREFORE, plaintiff prays to duly move this Court to grant the following relief:

- (1) Declare, that the proceedings leading to plaintiff's conviction pursuant to the special court-martial held at Camp Le June, North Carolina 28542, on September 21, 1971 be declared to have been obtained in violation of plaintiff's

constitutional rights, and to be null and void; and that the defendants to be directed, to take all necessary and all appropriate measures to cause the conviction to be expunged from plaintiff's record; and restore him to all rights, and privileges of which he was deprived as a direct result of that conviction.

- (2) Direct defendant, his subordinates and agents, and persons acting under his authority to correct all military and official records: to vacate and annul the conviction and sentence pursuant to said unconstitutional court-martial, and amend all records containing information pertaining to the character of plaintiff's service to reflect that the character of plaintiff's service is Honorable and to expunge the conviction, and all records pertaining to the void conviction; and
- (3) Direct by issuance of an injunction, that defendant recharacterize to Honorable the discharge of plaintiff, and issue a corrected DD 214 or in the alternative to furnish plaintiff with a replacement: Navy-Marine Corps Honorable Discharge Certificate and that the nature of service and Re-code and SPN boxes simply be marked "not applicable" or not "available;" and
- (4) Declare, in the alternative, that defendant violated plaintiff's constitutional rights in violation of its procurement rules and regulations in the recruitment of statutorily prohibited ineligible by Congresses authority for enlistment and Discharges, and that all the Boards of Review and Corrections were not in accordance with the law, nor supported by the substantial evidence in record.
- (5) Grant such other relief as the Court may deem just and proper to one, who has been led to be hung-out to dry; and to fall between the cracks reaching rightful justice.

Very respectfully and sincerely submitted,

Ronald L. Lanthron

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